District Youth Welfare Office 03/20/61-07/29/61
Public Guardianship
Dillingen/Danube

File Re: II/6 -

Information-Protocol
for the Purpose of Filiation

taken down by Ros Ruder

in the presence of child's mother Gebel, Emma
born 08/22/1941 in Ronsberg/CSR Occupation: unskilled worker
residing at Weisingen, 88 1/2

Reference: Public Ward Gebel, Walter Bernh.
born 01/26/62
residing in Weisingen with grandmother

1. a) Child's father's name, date and place of birth, occupation, address, employer, and income:
Molina Tirso Lopez, born 09/29/40
Service# US-156-663

   b) Child's father's location during, shortly prior to, or after [next word faded out]:
Augsburg - Sheridan-Barracks. Returned to America presumably in August, 1961

2. When and where did child's mother first meet him?
April '61 at the Hochhaus Restaurant, #241 Maximilianstr., Augsburg

3. When and where did the first sexual intercourse occur?
In a guest-room of the Thalia Hotel

4. Did subsequently intercourse take place frequently?
Yes.

5. When was the last time?

6. When did the child's mother have her last monthly period?
On 03/24/61

7. During which intercourse could conception have occurred?
Unknown.

8. More detailed information about the intercourse:
   a) Place?-------------
   b) With or without contraceptive? Without.

9. Did child's mother notify child's father of her pregnancy, and if so, when?
Yes, in the end of April, 1961

10. How did the child's father react?
He acknowledged his paternity and wanted to marry me.

11. Has he acknowledged his paternity in any letter or in the presence of witnesses?
a) Letter:------------
b) Names and addresses of witnesses:

12. Are there any other individuals who could provide information about said intimate relationship? ---------

13. Did child's mother have sexual intercourse with other men during the critical time-period (legal gestation period and/or shortly before or thereafter)?
No.

14. Where was the child born (in an institution or at home)?
At St.Elisabeth Hospital, Dillingen

15. Specific information by child's mother (child's weight and length; his development status)

=================================

16. a) Name of Midwife attending to birth?
Mrs. Teichmann
b) Attending physician?

I herewith release Midwife and/or medical physician from any professional confidentiality: I do.

17. Will child's mother agree to the taking of a blood sample for the purpose of a blood-type test? Yes.

18. Does child's mother have other illegitimate children? [✓ yes]/no
(If so: child's name, date and place of birth, child's father, guardianship court): Petra Christine. 07/21/1960.

I will affirm the information given by me at any time under oath before a court of law. I am aware of my responsibility to notify the District Youth Welfare Office immediately of any change in residence or of whereabouts.

I will also provide immediate notification in the case of any change in regard to my child's accommodations.

Dillingen , February 28, 1962

Taken down by: [Signed:] Emma Gebel
(Signature of child's mother)

Az.: II 6 -

Informations-Protokoll

zur Feststellung der Vaterschaft

aufgenommen durch PO. Riedler

mit der Kindesmutter Gebel Emmeka

geb. am 22.8.1941 in Ramberg/CSR Beruf: Hilfsarbeiterin

wohnhaft in Weißingen 88½

Betreff: Amtsmündel Gebel Walley Berul

geb. 26.1.62

wohnhaft Weißingen bei der Großmutter

1. a) Name, Geburtszeit u. -Ort, Beruf, Anschrift, Arbeitgeber und Verdienst des Kindesvaters:

Molina Tirso Lopez geb. 29.9.40

Service #. US-156 663 geb. 29.9.40 nach Ameri-

b Aufenthaltsverhältnisse des Kindsvaters während bzw. kurz vorher oder nachher: [illegible] August 1961

Augsburg - Sheridan-Kaserne

2. Wann und wo lernte die Kindesmutter ihn kennen:

Augsburg im April 61 beim Gasthaus Lochhaus

3. Wann und wo kam es zum ersten Geschlechtsverkehr Maximilian

Italia-Hotel Augsburg im Fremdenzimmer

4 Kam es in der Folge des öfteren zum Verkehr?

ja

5. Wann war der letzte Verkehr?

6. Wann hatte die Kindsmutter die letzte Monatsregel? 21.3.61

7. Bei welchem Verkehr dürfte die Empfängnis erfolgt sein?

nicht bekannt

8. Nähere Angaben über diesen Verkehr:

a) Ort? /

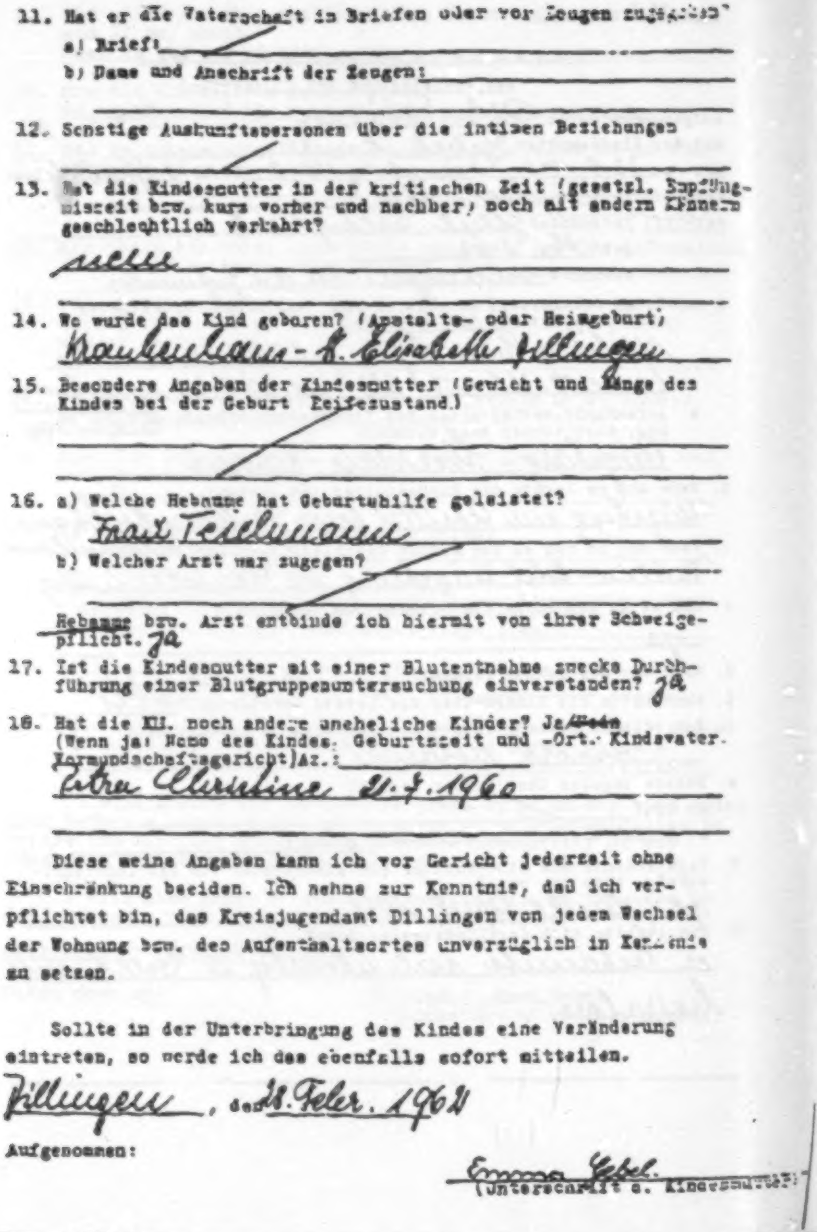
b. Normal oder mit Schutzmittel? ohne

9. Verständigte die Kindesmutter den Kindesvater von der Schwangerschaft, wenn ja, wann?

ja, Ende April 1961

10. Wie stellte sich der Kindesvater dazu?

er bekannte sich als Vater u. wolle mich heiraten.



11. Hat er die Vaterschaft in Briefen oder vor Zeugen zugegeben?
a) Brief:
b) Name und Anschrift der Zeugen:

12. Sonstige Auskunftspersonen über die intimen Beziehungen

13. Hat die Kindesmutter in der kritischen Zeit (gesetzl. Empfängniszeit bzw. kurz vorher und nachher) noch mit andern Männern geschlechtlich verkehrt?
nein

14. Wo wurde das Kind geboren? (Anstalts- oder Heimgeburt)
Krankenhaus-St. Elisabeth Dillingen

15. Besondere Angaben der Kindesmutter (Gewicht und Länge des Kindes bei der Geburt Reifezustand.)

16. a) Welche Hebamme hat Geburtshilfe geleistet?
Frau Teichmann
b) Welcher Arzt war zugegen?

Hebamme bzw. Arzt entbinde ich hiermit von ihrer Schweigepflicht. Ja

17. Ist die Kindesmutter mit einer Blutentnahme zwecks Durchführung einer Blutgruppenuntersuchung einverstanden? Ja

18. Hat die KM. noch andere uneheliche Kinder? Ja/~~Nein~~
(Wenn ja: Name des Kindes, Geburtszeit und -Ort, Kindsvater, Vormundschaftsgericht) Az.:
Petra Christine 21.7.1960

Diese meine Angaben kann ich vor Gericht jederzeit ohne Einschränkung beeiden. Ich nehme zur Kenntnis, daß ich verpflichtet bin, das Kreisjugendamt Dillingen von jedem Wechsel der Wohnung bzw. des Aufenthaltsortes unverzüglich in Kenntnis zu setzen.

Sollte in der Unterbringung des Kindes eine Veränderung eintreten, so werde ich das ebenfalls sofort mitteilen.

Dillingen, den 28. Febr. 1962

Aufgenommen:

Emma Gebel
(Unterschrift d. Kindesmutter)

EXHIBIT 3

File Re:II/4-432/27-1578 [Stamp:] Rural District Office
Dillingen/Danube
Recd.-April 9,1962
Section II/4

Rural District Dillingen/Danube
District Youth Welfare Office

[Stamp:] Rural District Office
Dillingen/Danube
Recd. Dec. 3,1963

[Third stamp illegible]

(Guardian Court__________
File Re.______________)

Report Sheet Re. Visit to Ward

Ward:

Gebel, Walter Bernhard
born 01/26/1962
in Dillingen/Danube
Religion: Roman Catholic
Citizenship: German
Siblings:__________

At current residence since:
Birth
Living with: Mother & grandmother
Name & address of Guardian:

Mother: & Father:

Gebel, Emma
born 08/22/1941
in Ronsberg/CSR
Religion: Roman Catholic
Citizenship: German
[Marital status:] Single
Occupation: domestic help
Residence: Weisingen 88 1/2

Married since:__________
To :__________

Request f.Permission to Report

submitted by assigned Family Case Worker w/request to call on ward & prepare report.

Dillingen/Danube
02/20/1962

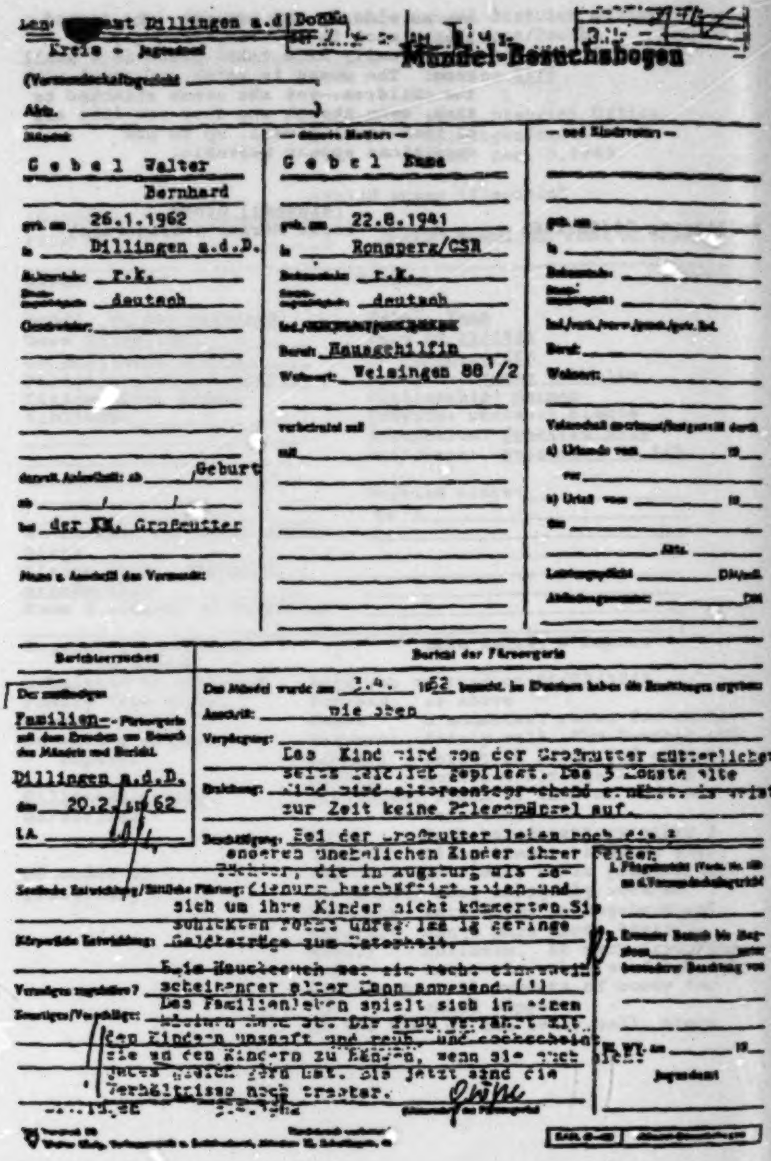
By order of
[Initials]

Case Worker's Report

Ward was visited on 04/03/1962.
Address: as above
Care: Grandmother cares for child
Nurture: fairly well. The 3-month-old
Occup.: infant is being fed commen-
Mental surate w/his age & shows no
developmt: signs of lack of care at
this time.
Moral Both her daughters'other 3
conduct: illegitimate children also
Physical live with their grandmother.
developmt: They allegedly work as
Rcvd.any waitresses in Augsburg and
estate?: don't care about their
Misc./ children. At very irregular
sug- intervals, they send her very
gestions: small amounts of money for
child support.
At the time of the house-call, there

was an elderly man present, who seemed pretty much in on everything (!) Their family life takes place in a small room. The woman is harsh and rough with the children--yet she seems attached to them, even though she does not like all of them equally well. Up to now conditions appear bearable.

[signed:] Große
Dillingen, 04/03/1962 (Case Worker's signature)



Land[illegible]amt Dillingen a.d.D. – Kreis – Jugendamt

(Vormundschaftsgericht ______

Aktz. ______)

Mündel-Besuchsbogen

3.4.

Mündel:	— dessen Mutter —	— und Kindesvater —
G e b e l Walter Bernhard	G e b e l Emma	
geb. am 26.1.1962	geb. am 22.8.1941	geb. am
in Dillingen a.d.D.	in Ronsperg/CSR	in
Bekenntnis: r.k.	Bekenntnis: r.k.	Bekenntnis:
Staatsangehörigkeit: deutsch	Staatsangehörigkeit: deutsch	Staatsangehörigkeit:
Geschwister:	led.	led./verh./verw./gesch./getr. led.
	Beruf: Hausgehilfin	Beruf:
	Wohnort: Weisingen 88 1/2	Wohnort:
	verheiratet mit	Vaterschaft anerkannt/festgestellt durch
	mit	a) Urkunde vom ______ 19__ vor
derzeit. Aufenthalt: ab Geburt		b) Urteil vom ______ 19__ des
ab		______ Aktz. ______
bei der KM. Großmutter		Leistungspflicht ______ DM/mtl.
Name u. Anschrift des Vormunds:		Abfindungssumme: ______ DM

Berichtsersuchen	Bericht der Fürsorgerin
Der zuständigen Familien-Fürsorgerin mit dem Ersuchen um Besuch des Mündels und Bericht. Dillingen a.d.D. den 20.2.1962 I.A.	Das Mündel wurde am 3.4. 1962 besucht. Im Einzelnen haben die Ermittlungen ergeben:

Anschrift: wie oben

Verpflegung: Das Kind wird von der Großmutter mütterlicherseits leidlich gepflegt. Das 3 Monate alte

Bekleidung: Kind wird altersentsprechend ernährt. Es weist zur Zeit keine Pflegemängel auf.

Beaufsichtigung: Bei der Großmutter leben noch die 2 anderen unehelichen Kinder ihrer beiden Töchter, die in Augsburg als Be-

Seelische Entwicklung/Sittliche Führung: dienung beschäftigt seien und sich um ihre Kinder nicht kümmerten. Sie schickten [illegible] unregelmäßig geringe

Körperliche Entwicklung: Geldbeträge zum Unterhalt.

Beim Hausbesuch war ein recht [illegible] scheinender alter Mann anwesend (!)

Vermögen zugefallen?

Anregungen/Vorschläge: Das Familienleben spielt sich in einem kleinen Raum ab. Die Frau verfährt mit den Kindern unsanft und rauh, und [illegible] sie an den Kindern zu [illegible], wenn sie auch jedes gleich gern hat. Bis jetzt sind die Verhältnisse noch tragbar.

[illegible] [illegible]

Unterschrift der Fürsorgerin

1. Pflegeerlaubnis (Vord. [illegible]) an d. Vormundschaftsgericht

2. Erneuter Besuch bis [illegible] oder besondere Beachtung von

3. Wv. am ______ 19__

Jugendamt

EXHIBIT 4

File Re: II/4-433/27-1578

[Stamp:] Rural District Office
Dillingen/Danube
Recd.-May 16, 1962
Section II/4

Rural District Dillingen/Danube
District Youth Welfare Office

Dillingen/Danube

(Guardian Court
File Re.)

Report Sheet Re. Visit to Ward

Ward:

Gebel, Walter Bernhard
born 01/26/1962
in Dillingen/Danube
Religion: Roman Catholic
Citizenship: German
Siblings:

At current residence since: Birth
Living with:

Name & address of Guardian:

Mother: **& Father:**

Gebel, Emma
born 08/22/1941
in Ronsberg
Religion: Roman Catholic
Citizenship: German
[Marital status:] Single
Occupation: None
Residence: Weisingen 88 1/2

Married since:
To :

Request f. Permission to Report

submitted by assigned Family Case Worker w/request to call on ward & prepare report.

Dillingen/Danube
05/09/1962

By order of
[signed:] Rieder

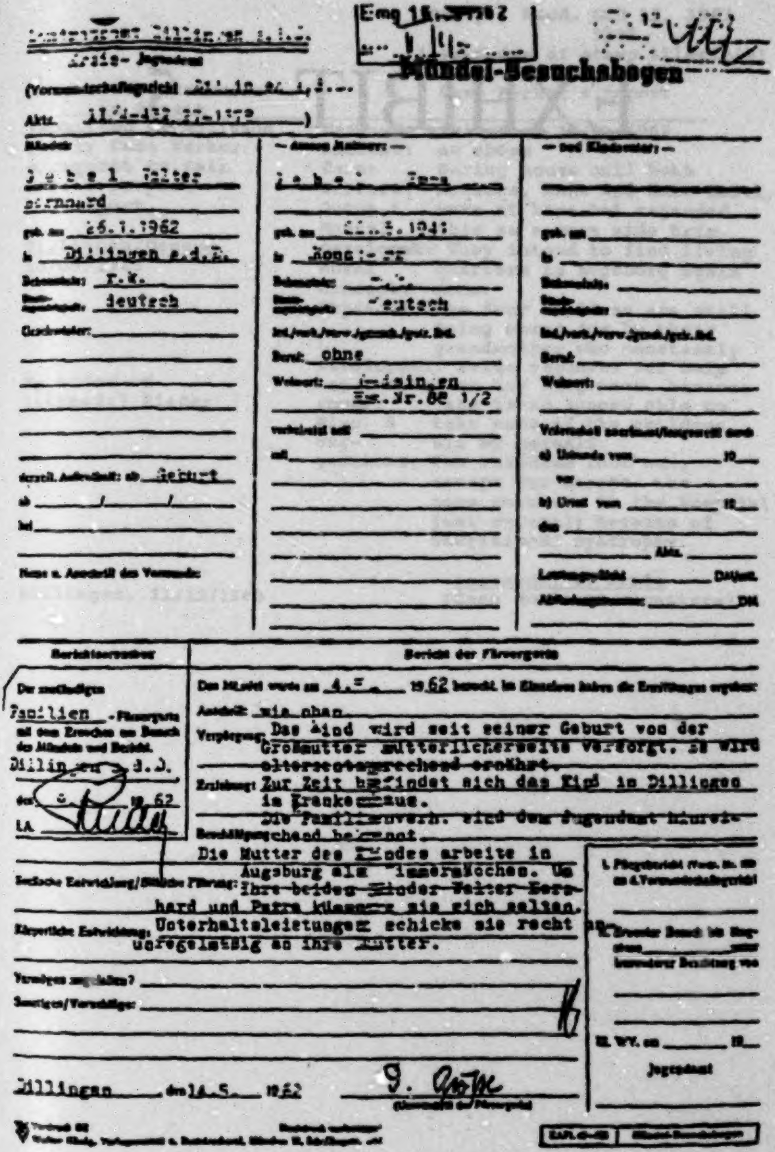
Case Worker's Report

Ward was visited on 05/04/1962.
Address: as above
Care:
Nurture:
Occup.:
Mental developmt:
Moral conduct:
Physical developmt.:
Any estate rcvd?:
Misc. & suggestions:

Infant has been cared for by his maternal grandmother since birth and is being fed commensurate with his age. Currently, the infant is hospitalised in Dillingen. Youth Office is well aware of domestic circumstances. Child's mother allegedly works in Augsburg as a chambermaid. She seldom tends her two children, Walter Bernhard and Petra. She sends support money to her mother very irregularly.

Dillingen, 05/14/1962

[signed:] I. Große
(Case Worker's signature)



Landratsamt Dillingen a.d.D.
Kreis- Jugendamt
(Vormundschaftsgericht Dillingen a.d.D.
Aktz. [illegible])

Eing. 15. [illegible] 1962

Mündel-Besuchsbogen

Mündel:	— Angaben Kindesmutter: —	— bzgl. Kindesvater: —
Gebel Walter Bernhard	[illegible]	
geb. am 26.1.1962	geb. am [illegible] 1941	geb. am
in Dillingen a.d.D.	in [illegible]	in
Bekenntnis: r.k.	Bekenntnis: [illegible]	Bekenntnis:
Staatsangehörigkeit: deutsch	Staatsangehörigkeit: deutsch	Staatsangehörigkeit:
Geschwister:	led./verh./verw./gesch./getr. lbd.	led./verh./verw./gesch./getr. lbd.
	Beruf: ohne	Beruf:
	Wohnort: [illegible] Hs.Nr. 80 1/2	Wohnort:
	verheiratet seit	Vaterschaft anerkannt/festgestellt durch
	mit	a) Urkunde vom ___ 19__ vor
derzeit. Aufenthalt: ab Geburt		b) Urteil vom ___ 19__
ab ___ / ___ / ___		des
bei		___ Aktz. ___
Name u. Anschrift des Vormunds:		Leistungspflicht ___ DM/mtl.
		Abfindungssumme: ___ DM

Berichtsersuchen

Der zuständigen Familien- Fürsorgerin mit dem Ersuchen um Besuch des Mündels und Bericht.
Dillingen a.d.D.
den 6. [illegible] 1962
I.A. [illegible]

Bericht der Fürsorgerin

Das Mündel wurde am 4.5. 1962 besucht. Im Einzelnen haben die Ermittlungen ergeben:

Anschrift: wie oben

Verpflegung: Das Kind wird seit seiner Geburt von der Großmutter mütterlicherseits versorgt. Es wird altersentsprechend ernährt.

Erziehung: Zur Zeit befindet sich das Kind in Dillingen im Krankenhaus.

Beschäftigung: Die Familienverh. sind dem Jugendamt hinreichend bekannt.

Seelische Entwicklung/Sittliche Führung: Die Mutter des Kindes arbeite in Augsburg als Zimmermädchen. Um ihre beiden Kinder Walter Bernhard und Petra kümmere sie sich selten.

Körperliche Entwicklung: Unterhaltsleistungen schicke sie recht unregelmäßig an ihre Mutter.

Vermögen vorhanden?

Sonstiges/Vorschläge:

Dillingen, den 14.5. 1962
G. Grosse
(Unterschrift der Fürsorgerin)

I. Pflegebericht (Vordr. Nr. [illegible]) an d. Vormundschaftsgericht
II. Erneuter Besuch bei [illegible] besonderer Beachtung von
III. WV. am ___ 19__
Jugendamt

Nachdruck verboten
Walter Kluge, Verlagsanstalt u. Buchdruckerei, München [illegible]

[illegible] | Mündel-Besuchsbogen

EXHIBIT 5

[Stamp:] Recd. OCT 12, 1963
5241
[remainder of stamp illegible]

Request f.Permission to Report	Case Worker's Report	
submitted by assigned	Ward was visited on 12/11/1963.	
Family Case Worker	Address:	as above
w/request to call	Care:	During house call both
ward & prepare	Nurture:	mothers, Anna and Emma Gebel,
report.	Occup.:	were at home but regarded
	Mental	this as a mere side trip.
Dillingen/Danube	developmt:	They intend to find living
10/08/1963	Moral	quarters in Augsburg again
	conduct:	soon.
	Physical	The four children are still
		being cared for by their
		grandmother who constantly
	developmt.:	sends requests for help
By order of	Any estate	to her daughters, because
[signed:] Rieder	recd?:	she is no longer able to
	Misc. &	take care of the children
	sug-	all by herself.
	gestions:	The children look wan,
		except for Renate, who
		once more was in the hospital
		just recently because of
		nutritional dystrophy.

Dillingen, 12/12/1963

[signed:] I. Große
(Case Worker's signature)

EXHIBIT 6

IV/411 - 70 - Copy -

Reference: The Gebel children, currently residing at the Josefinum in Augsburg.

Memorandum:

On 01/18/1963, at 12:10 o'clock, the Chief Physician of the Josefinum Children's Hospital in Augsburg requested an extension of above-mentioned children's in-patient status. Said individual was requested to submit to us a written request for extension.

During the course of the discussion, the physician stated that the children could be released in approximately 10-14 days. In his opinion, their domestic environment is most unfavorable, lacking not only in supervision and nurture but primarily in care; Most likely, they do not get enough to eat; accommodations are extremely poor; the children are undernourished and appear haggard and sickly, and neither their grandmother nor their mother is in a position to care properly for the children. The former cannot be expected to nurture and care for more than 2 children, maximum. To leave more children in her care would be insupportable and irresponsible; that, if the 4 children presently under the medical care of Josefinum Hospital in Augsburg were to be returned to their former environment, they would have to remain at Josefinium for at least 6 or more weeks for recuperation. The physician would take it upon himself to approach the District Youth Welfare Office about sending the children into the Allgäu region [Bavaria] for several weeks (about 10-14 days) to recuperate, following their release from the hospital. Furthermore, he would recommend that, aside from the cost for the delivery and pickup of the children, there would be no further expenditures.

Unable to reach the case worker of the District Youth Welfare Office by telephone at the time (12.10 o'clock), the Chief Physician requested that the undersigned inform said office of aforementioned telephone conversation.

Dillingen/Danube, 01/18/1963
Rural District Office -
Department of Public Welfare
By Order:
[typed:] signed: Tiefenbacher

Copy

to Section II/4

on the premises
for your information

Rural District Office
- Department of Public Welfare -
[typed:] signed: Tiefenbacher

IV/411 – 70 – Abdruck – – [illegible]

Betreff: Kinder Gebel, z.Zt. Josefinum Augsburg.

Aktenvormerkung:

Der leitende Arzt des Kinderkrankenhauses Josefinum in Augsburg ersuchte am 18.1.1963, 12.10 Uhr, den Krankenhausaufenthalt der genannten Kinder noch zu verlängern. Der Genannte wurde ersucht, hier einen schriftlichen Verlängerungsantrag einzubringen.

Im weiteren Verlauf der Unterredung erklärte der Arzt, daß die Kinder in etwa 10 – 14 Tagen entlassen werden könnten. Nach seiner Meinung ist das Milieu zuhause denkbar ungünstig, es fehle dort nicht nur an der Erziehung und Versorgung der Kinder, sondern in erster Linie an der Betreuung der Genannten. Vermutlich erhalten diese dort nicht genügend zu essen, die Unterbringung sei denkbar schlecht; die Kinder seien unterernährt, machen einen abgehärmten, krankhaften Eindruck. Weder die Großmutter, noch die Kindesmutter seien in der Lage, die Kinder ordentlich zu versorgen. Der Ersteren könnte zugemutet werden, allerhöchstens die Erziehung und Betreuung von 2 Kindern zu übernehmen. Weitere Kinder dort zu belassen, sei nicht mehr zu vertreten und unverantwortlich. Sofern die 4 Kinder, die sich augenblicklich im ärztlicher Behandlung im Josefinum in Augsburg befinden, wieder in ihre frühere Umgebung zurückkehren sollten, müßten sie mindestens 6 oder noch mehr Wochen zur Erholung im Josefinum bleiben. Der Arzt wird von sich aus an das Kreisjugendamt herantreten, da die Kinder nach der Krankenhausbehandlung (etwa 10 – 14 Tage) für einige Wochen zur Erholung ins Allgäu kommen sollten. Er würde sich dafür

./.

verwenden, daß außer den Verbringungs- und Abholungskosten weitere Auslagen nicht entstehen.

Nachdem der leitende Arzt des genannten Heimes den Sachbearbeiter beim Kreisjugendamt nicht mehr telefonisch sprechen konnte (12.10 Uhr), ersuchte er den Unterfertigten, diese Stelle über die geführte Unterredung zu unterrichten.

Dillingen a.d.Donau, den 18.1.1963
Landratsamt - Sozialhilfeverwaltung
I.A.
gez.: Tiefenbacher

In Abdruck

an
das Sachgebiet II/4

im Hause

mit der Bitte um Kenntnisnahme.

Landratsamt Dillingen a.d.Donau
- Sozialhilfeverwaltung -
gez.: Tiefenbacher

EXHIBIT 7

Copy

Hindelang/Allgäu, 04/03/63
Gailenbergstr.170
Phone: 222

To: **Chief Physician of**
Josefinum [Hospital]

Augsburg

Dear Dr. Freislederer,

Your 4 small Gebel -charges spent the period from 02/21 until 03/20/63 here with us.

Following is a report of medical findings both at the time of admission and the time of release, prepared by our physician Dr. Heincke:

Petra Gebel, born 07/21/60
02/21/63: Height proportionate to age; nutritional condition is adequate; blood circulation in mucous membrane is adequate; maxillary glands are small and robust; expiration slightly prolonged and rough, without secondary murmur; tonsils much enlarged and red--no coating; heart normal; weight, 11.2 kg.
03/06/63: Flu, temperature: 38.5 C; lungs: rougher expiration without secondary murmur; tonsils much enlarged and red; prescribed durenat-juice; fever subsided.
03/09/63: Lungs normal; throat only slightly red; child may be up and about.
03/19/63: Child much improved; skin still pale; good blood circulation in mucous membrane; tonsils enlarged, without redness; heart and lungs normal; weight, 12.6 kg.

Walter Gebel, born 01/26/62
02/21/63: Height proportionate to age; nutritional condition is good; good blood circulation in skin and mucous membrane; severe nose-cold; tonsils are small and not irritated; maxillary glands are small and robust; isolated large blisters above lungs; lungs normal; weight, 9.2 kg.
03/06/63: Child still suffering from nose-cold; throat without irritation; lungs normal.
03/11/63: Lungs normal.
03/19/63: Child well improved; healthy complexion; no throat -irritation; lungs and heart normal; weight, 10.3kg.

Renate Gebel, born 01/19/60
02/21/63: Height proportionate to age; nutritional condition adequate; pale skin; blood circulation in mucous membrane is moderate; tonsils not irritated;

maxillary glands are small and robust; heart and lungs are normal; weight, 11.3 kg.
03/04/63: Came down with flu; temperature, 39.2 C; rough expiration and isolated large blisters above both lungs; prescribed achromycine; also cardiazol to enhance circulation.
03/06 & 03/10: Our physician reexamined the child; fever subsided.
03/11/63: Renate able to be up and about.
03/19/63: Healthy complexion; good blood circulation in skin and mucous membrane; no redness in throat; heart and lungs normal; weight, 12.3 kg.

Michael Gebel, born 07/18/61
02/23/63; Child arrived with severe nose-cold; height proportionate to age; nutritional condition is moderate; good blood circulation in skin and mucous membrane; no redness in throat; maxillary glands are small and robust; thorax slightly rachitic; heart and lungs normal; weight, 11.1 kg
03/03/63: Throat and lungs normal.
03/19/63: Very healthy appearance; good blood-circulation in skin and mucous membrane; throat without redness; heart and lungs normal; weight, 12.6 kg.

All four children developed an amazing appetite and became acclimatized to their new environment very quickly. Because of the wonderful winter weather, they were able to be outdoors almost every day and looked very well-rested, when the case worker from Dillingen picked them up. However, there was a heart-wrenching scene, when the four children were put into the car and none of them wanted to leave. They let out ear-splitting screams and tried to get out of the car by pushing against the windows. To console them, I placed a large teddy bear into the car, which took their minds off their departure a bit.
The clothes and underwear, which the children had brought along, we returned to the Josefinum, and we asked the case worker to return their boots from Weisingen as well, since I had been unable to come up with 4 pair of new boots, much as I tried. However, we did succeed in outfitting them with complete sets of new clothes before sending them home. Kind donors had sent slacks, stockings, tights, sweaters, and coats, so as to make the four of them look very cute, dressed in matching brother-and-sister outfits on the day of their departure.

[Next paragraph is unrelated to the Gebel family.] Little Sylvia Oppel, who could not come along at the time, can be admitted after Easter.

If you ever get children as wretched as these again--we now have enough room to take them in.

Cordially,

Sister Martha Utsch

An den
Herrn Chefarzt des
Josefinums

Augsburg

Sehr geehrter Herr Dr. Freislederer,

Ihre 4 kleinen Schützlinge Gebel sind in der Zeit vom 21.2. - 20.3.63 bei uns gewesen.

Zunächst die Aufnahme- und Entlassungsbefunde durch unsere Ärztin Frau Dr. Neinke:

Petra Gebel, geb. 21.7.60

21.2.63: Größe dem Alter entsprechend, ausreichender Ernährungszustand, Schleimhäute ausreichend durchblutet, kleine derbe Kieferwinkeldrüsen, etwas verlängertes und verschärftes Expirium, keine Nebengeräusche, Tonsillen sehr groß, gerötet, keine Beläge, Herz o.B. Gewicht: 11,2 kg.
6.3.63: Grippe, Temperatur, 38,5, Lunge verschärftes Expirium, keine Nebengeräusche, sehr große gerötete Tonsillen. Es wurde Durenatsaft verordnet. Temperaturen klangen ab.
9.3.63: Lungen o.B. Rachen nur noch leicht gerötet, Kind kann wieder aufstehen.
19.3.63: Sehr gut erholtes Kind, Haut noch blaß, Schleimhäute gut durchblutet, Tonsillen groß, nicht gerötet, Herz und Lungen o.B. Gewicht 12,6 kg.

Walter Gebel: geb. 26.1.62

21.2.63: Größe dem Alter entsprechend, guter Ernährungszustand, Haut und Schleimhäute gut durchblutet, starker Schnupfen, Tonsillen klein, reizlos, kleine derbe Kieferwinkeldrüsen, über beiden Lungen einzelne grobblasige RG, Lungen o.B. Gewicht 9, 2 Kg.
6.3.63: Kind hat immer noch Schnupfen, Rachen reizlos, Lungen o.B.
11.3.63: Lungen o.B.
19.3.63: Kind hat sich gut erholt, frisches Aussehen, Rachen reizlos, Lungen und Herz o.B. Gewicht 10,3 kg.

Renate Gebel: geb. 19.1.60

21.2.63: Große dem Alter entsprechend, ausreichender Ernährungszustand, Haut blaß, Schleimhäute mäßig durchblutet, Tonsillen reizlos, kleine derbe Kieferwinkeldrüsen, Herz und Lungen o.B. Gewicht 11,3 kg.
4.3.63 An Grippe erkrankt, Temperatur 39,2 über beiden Lungen verschärftes Expirium mit einzelnen grob-

blasigen RG, es wurde Achromycin verordnet, zur Unterstützung des Kreislaufs Cardiazol.
5. u.10.3. Unsere Ärztin sah das Kind nochmal an, die Temperatur sank ab.
11.3.63 Renate konnte wieder aufstehen
19.3.63 Frisches Aussehen, Haut und Schleimhäute gut durchblutet, Rachen nicht gerötet, Herz und Lungen o.B. Gewicht 12,3 kg.

Michael Gebel: geb. 18.7.61

23.2.63 Kind ist mit starkem Schnupfen angekommen, Größe dem Alter entsprechend, mäßiger Ernährungszustand Haut und Schleimhäute gut durchblutet, Rachen nicht gerötet, kleine derbe Kieferwinkeldrüsen, leicht rachitischer Thorax, Herz und Lungen o.B. Gewicht 11,1 kg.
1.3.63 etwas verschärftes Expirium. Rachen leicht gerötet.
3.3.63 Rachen o.B. Lungen o.B.
19.3.63 Sehr frisches Aussehen, Haut und Schleimhäute gut durchblutet, Rachen nicht gerötet, Herz und Lungen o.B. Gewicht 12,5 kg.

Alle vier Kinder entwickelten einen beneidenswerten Appetit und lebten sich sehr schnell in ihrer neuen Umgebung ein. Durch das schöne Winterwetter konnten sie fast täglich im Freien sein, waren auch alle sehr frisch erholt, als sie von der Fürsorgerin aus Dillingen wieder abgeholt wurden. Es war allerdings erschütternd, als die 4 Kinder ins Auto verfrachtet wurden und keines mit diesem Abtransport einverstanden war. Es gab ein ohrenbetäubendes Geschrei und alle versuchten, sich an die Scheiben stemmend, wieder aus dem Auto herauszukommen. Als Trost setzte ich ihnen dann noch einen großen Teddybären ins Auto, der sie vom Abschied etwas ablenkte.
Die Kleidungs- und Wäschestücke, die die Kinder mitgebracht hatten, haben wir an das Josefinum zurückgeschickt und die Fürsorgerin gebeten, von Weisingen aus auch die Stiefel zurückzuschicken. Denn 4 Paar neue Stiefel konnte ich mit dem besten Willen nicht mehr organisieren, obwohl es uns gelungen war, die Kinder völlig neu eingekleidet nach Haus zu entlassen. Gütige Spender hatten mir lange Hosen, Strümpfe, Strumpfhosen, Pullover und Jacken geschickt, sodaß die vier sogar in passender Geschwisterkleidung bei der Abreise wirklich ganz reizend aussahen.

Die kleine Sylvia Oppel, die ja damals noch nicht mitgekommen konnte, kann nach Ostern aufgenommen werden. Ich werde die Mutter benachrichtigen.

Wenn Sie mal wieder so elende Kinder haben, haben wir jetzt auch wieder Platz, sie aufzunehmen.

Freundliche Grüße

Schw. Martha Utsch

EXHIBIT 8

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

During my visit at the hospital in Dillingen, I learned from my mother and married sister, Mrs. Katharina Matt, that none of this is true."

Dillingen/Danube, 01/03/1964 [sic]
(signed on shorthand pad)

Closed by: v.g.u.u. [=read to, approved & signed]
s/Rieder [typed:] s/ Emma Gobel

Betreff: Amtsvormundschaft über die Kinder
G e b e l Petra, geb.21.7.60 — KM Emma Gebel
G e b e l Walter, geb.26.1.62
G e b e l Renate, geb.19.5.60 — KM Anna Gebel
G e b e l Michael, geb.12.7.61

Niederschrift:

Die Mutter der beiden erstgenannten Kinder Frl.Emma Gebel wurde heute durch ihren Quartiergeber, Herrn Xaver Stehle, Augsburg, Schönbachstr.98 zum Telefon gerufen. Ihr wurde mitgeteilt, daß ihre beiden Kinder am Freitag den 31.1.64 in das Kinderheim nach Wittislingen verbracht werden mußten. Ebenso die Kinder ihrer Schwester Anna. Die Unterbringung war deshalb veranlasst, weil die Großmutter der Kinder, Frau Maria Gebel, Weisingen, Hs.Nr.88 1/2 plötzlich in das Krankenhaus Dillingen eingeliefert werden mußte. Die Kinder waren sich selber überlassen. Frl.Emma Gebel erhielt die Weisung, umgehend nach Dillingen zur Klärung des Sachverhaltes zu kommen Sie sprach gegen 14.00 Uhr beim Kreisjugendamt Dillingen vorl Nach Bekanntgabe des Sachverhalts gab sie an, daß sie heute im Cafe Biedermeier, Augsburg, Brucknerstr.2 Telefon 318 404 hätte als Bedienung anfangen sollen. Eine telefonische Rücksprache in Augsburg mit dem Geschäftsleiter des Cafes erbrachte, daß Gebel Emma zwar noch nicht als Bedienung eingestellt ist, sondern sich lediglich vorstellen sollte. Dies sei im Laufe des heutigen Tages auch noch möglich. Der Geschäftsleiter teilte mit, daß er jeweils nach 15.00 Uhr anzutreffen wäre. Herr Dr.Kampik teilte auf Anfrage mit, daß Frau Gebel mindestens noch diese Woche, wenn nicht sogar noch nächste Woche im Krankenhaus sein müsse. Der genaue Zeitpunkt der Entlassung stünde noch nicht fest.

Frl.Emma Gebel will nun die Kinder im Kinderheim in Wittislingen belassen und der Sozialhilfeverwaltung eine entsprechende Kostenhaftungserklärung geben. Sie will unter allen Umständen die Arbeit als Bedienung im Cafe Biedermeier aufnehmen und wie sie angibt, für den Unterhalt ihrer Kinder selbst aufkommen.

Ihre Schwester Anna Gebel habe sie in Augsburg ebenfalls in einem Cafe-Haus angetroffen. Sie sei dort mit noch 2 anderen Mädchen dort gewesen. An dem gleichen Tisch waren auch noch einige Männer, die mir nicht bekannt waren. Auf die Frage, ob sie nicht mit nach Dillingen fahren wolle verneinte sie dies. Sie wolle angeblich heute gegen 16.00 Uhr mit dem Bundesbahnbus nach Weisingen zurückfahren.

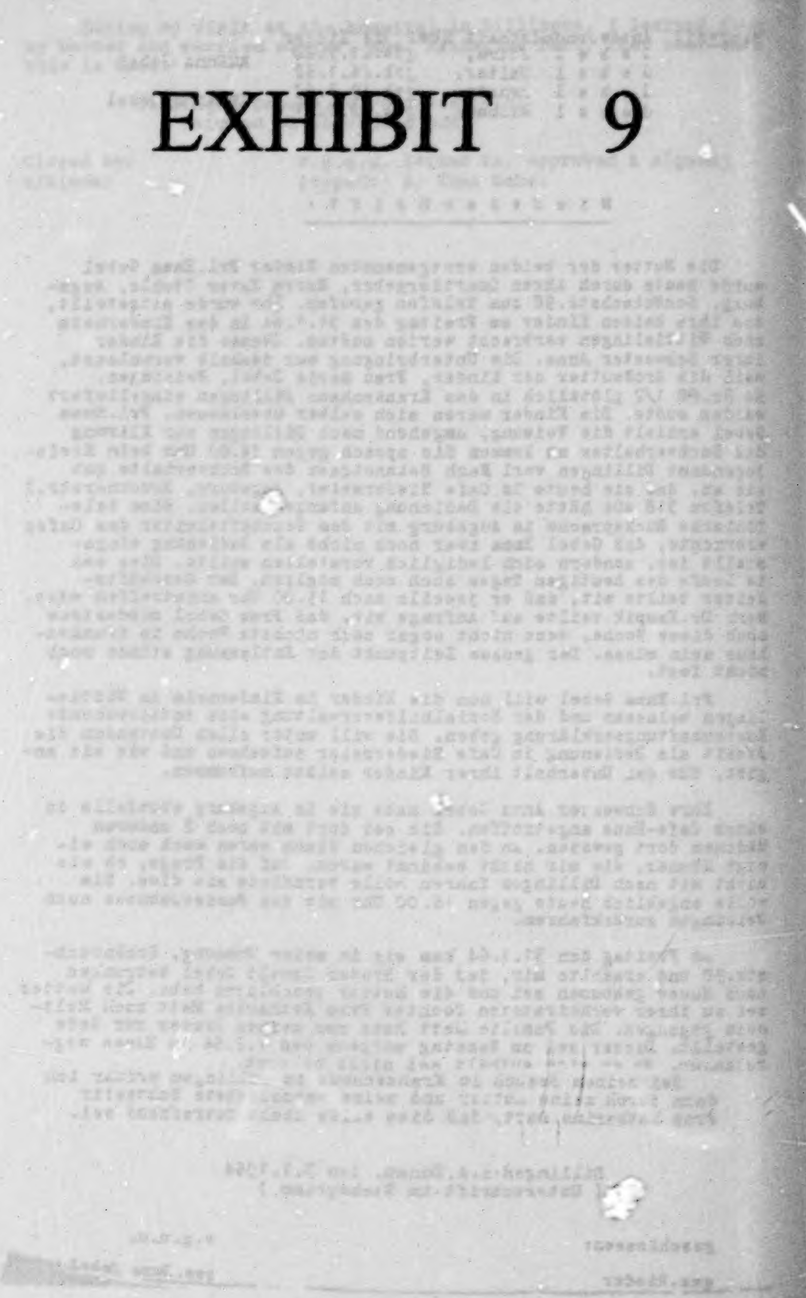
Am Freitag den 31.1.64 kam sie in meine Wohnung, Schönbachstr.98 und erzählte mir, daß der Bruder Oswald Gebel betrunken nach Hause gekommen sei und die Mutter geschlagen habe. Die Mutter sei zu ihrer verheirateten Tochter Frau Katharina Matt nach Holzheim gegangen. Die Familie Matt habe nun meinen Bruder zur Rede gestellt. Dieser sei am Samstag morgens den 1.2.64 zu Hause weggegangen. Wo er sich aufhält sei nicht bekannt.
Bei meinem Besuch im Krankenhaus in Dillingen erfuhr ich dann durch meine Mutter und meine verheiratete Schwester Frau Katharina Matt, daß dies alles nicht zutreffend sei.

Dillingen a.d.Donau, den 3.2.1964
(Unterschrift im Stenogramm)

geschlossen: v.g.u.u.

gez.Rieder gez.Emma Gebel

EXHIBIT 9



VII 126/62

1. **Release of files approved.**
2. **Mailing of files to be entered into record.**
3. **Ship files by certified mail to:**

Dr. Müller, et al
Attorneys at Law
Faktoreistr. 1

66111 Saarbrücken

commensurate with request, dated 01/05/1994, for a one-week review.

Please remit flat-rate postage of DM 10.00 either by coupons or fee-stamp, in compliance with § 5 III of Judicial Administrative Code.

89407 Dillingen, January 12, 1994
Director of County Court

[signed:] Helmschrott
Helmschrott

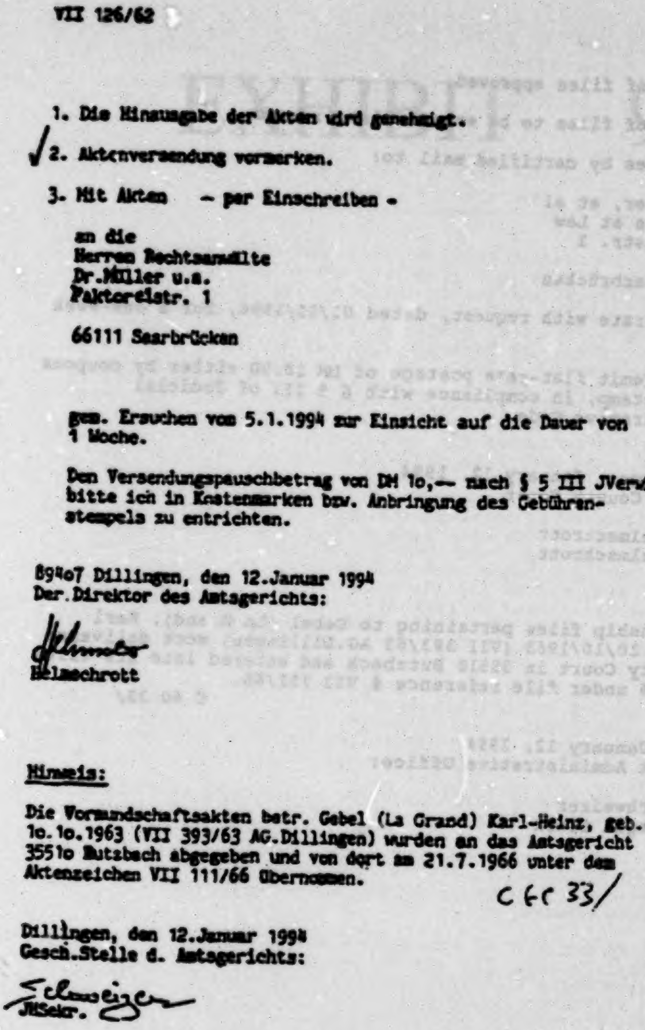
Note:

The guardianship files pertaining to Gebel (La Grand), Karl Heinz, born 10/10/1963 (VII 393/63 AG.Dillingen) were delivered to the County Court in 35510 Butzbach and entered into its files on 07/21/166 under file reference # VII 111/66.

C 60 33/

Dillingen, January 12, 1994
County Court Administrative Office:

[signed:] Schweizer
Legal Clerk



VII 126/62

1. Die Hinausgabe der Akten wird genehmigt.

✓2. Aktenversendung vormerken.

3. Mit Akten – per Einschreiben –

an die
Herren Rechtsanwälte
Dr.Müller u.a.
Faktoreistr. 1

66111 Saarbrücken

gem. Ersuchen vom 5.1.1994 zur Einsicht auf die Dauer von 1 Woche.

Den Versendungspauschbetrag von DM 1o,-- nach § 5 III JVerwK bitte ich in Kostenmarken bzw. Anbringung des Gebührenstempels zu entrichten.

894o7 Dillingen, den 12.Januar 1994
Der.Direktor des Amtsgerichts:

Helmschrott

Hinweis:

Die Vormundschaftsakten betr. Gebel (La Grand) Karl-Heinz, geb. 1o.1o.1963 (VII 393/63 AG.Dillingen) wurden an das Amtsgericht 3551o Butzbach abgegeben und von dort am 21.7.1966 unter dem Aktenzeichen VII 111/66 übernommen.

C 6C 33/

Dillingen, den 12.Januar 1994
Gesch.Stelle d. Amtsgerichts:

Schweizer
JHSekr.

EXHIBIT 10

II/4-432/27 - 1405,1426,1549,1578

Reference: Public Guardianship of
Gebel, Renate, born 05/19/1960* Anna
Gebel, Petra, " 07/21/1960* Emma
Gebel, Michael " 07/18/1961* Anna
Gebel Walter, " 01/26/1962* Emma

Protocol

This day, Mrs. Maria Gebel, residing in Weisingen, H.#88 1/2, grandmother of above-mentioned children, appeared at the District Youth Welfare Office. Having been informed about the contents of a letter dated 01/27/1964, from the Family-Compensation-Fund of the Northwest German Building Trade, Berlin, she made the following statement relating thereto:

The above-mentioned children have been under my care in Weisingen since their birth. Until and including the month of December, 1963, I received my children's allowance from the Family-Compensation Fund of the Northwest German Building Trade.

Following their hospitalization--only during the periods from 12/19 to 12/20/1962 in the Dillingen hospital and from 12/20 to 02/21/1963 at the Josefinum Children's Hospital in Augsburg, Kapellenstr.#30, as in-patients, said children spent until 03/20/63 in the Tama Recreation Home at Hindelang and were subsequently returned into the care of their grandmother.

Karlheinz Gebel, born 10/10/1963, is an illegitimate child of my daughter, Emma Gebel, born 08/22/1941, who is currently residing in the home of Xaver Stehle, #98 Schönbachstr in Augsburg. I do not know where she is employed. To my knowledge, she has placed the child in a [children's] home in Augsburg. In all likelihood, the Municipal Youth Welfare Department is the child's Guardian.

*phone: 31 8501

Dillingen/Danube, 01/30/1964
[typed:] s/: Marie Gebel

II/4 - 432/27 - 1405,1426,1549,1578

Betreff: Amtsvormundschaft über
Gebel Renate, geb.19. 5.1960 } Anna
Gebel Petra, " 21. 7.1960 }
Gebel Michael, " 18. 7.1961 } Emma
Gebel Walter, " 26. 1.1962 }

Niederschrift

Die Großmutter der o.a.Kinder, Frau Maria Gebel, wohnhaft in Weisingen Hs.Nr.88 1/2 erschien heute beim Kreisjugendamt. Ihr wurde der Inhalt des Schreibens der Familienausgleichskasse des nordwestdeutschen Baugewerbes, Berlin, vom 27.1.1964 bekanntgegeben. Sie gibt hierzu folgendes an:

Die o.a.Kinder befinden sich seit ihrer Geburt bei mir in Weisingen in Pflege. Bis einschließlich Dezember 1963 habe ich von der Familienausgleichskasse des nordwestdeutschen Baugewerbes das Kindergeld erhalten.

Die genannten Kinder waren lediglich in der Zeit
vom 19.12. - 20.12.1962 im Krankenhaus in Dillingen und
vom 20.12. - 21. 2.1963 im Kinderkrankenhaus Josefinum in Augsburg, Kapellenstr.30 in stationärer Behandlung. Sie waren anschließend bis 20.1.64 zum Erholungsaufenthalt in Erholungsheim Tama in Hindelang. Darnach kamen die Kinder wieder zur Großmutter in Pflege.

Bei dem Kind Karlheinz Gebel, geb.10.10.1963, handelt es sich um ein unehel.Kind meiner Tochter Emma Gebel, geb.22.8.1941, z.Zt. wohnhaft in Augsburg, [illegible] ~~[illegible] 25~~ bei Xaver Stehle^x. Wo sie beschäftigt ist, ist mir nicht bekannt. Soweit mir bekannt, hat sie das Kind in einem Heim in Augsburg untergebracht. Die Vormundschaft für dieses Kind dürfte vermutlich beim Stadtjugendamt in Augsburg geführt werden.

x) Tel. 118501

Dillingen a.d.D., den 30.1.1964

gez.: Marie Gebel

EXHIBIT 11

[Translation from German-Language Original]

Rural District Office
Dillingen on the Danube
888 Dillingen/Danube, 02/05/1964
Phone: 455,456,457.

II/4-432/27-1405,1426,
1549,1578 R/B
(please indicate in your reply)

To: Inspector, Rural Police
888 Dillingen/Danube

Reference: Public Guardianship of Children:
Gebel, Petra, born 07/21/1960 children's
Gebel, Walter, born 01/26/1962_ mother:
Emma Gebel
Gebel, Renate, born 05/19/1960 children's
Gebel, Michael, born 07/18/1961 mother:
Anna Gebel

On 01/31/64, at approximately 2 p.m., the District Youth Welfare Office was informed by the mayor of the community of Weisingen, that the children residing in Weisingen, House #88 1/2, were on their own without supervision or food. On 01/31/64, the children's grandmother, Mrs. Maria Gebel, had to be admitted unexpectedly into the hospital at Dillingen. However, Anna Gebel, who had been entrusted with the supervision of the children, locked them up and left, destination unknown, presumably for Augsburg. Mrs. Maria Gebel described what transpired,as follows.

On 01/31/64, Mrs. Maria Gebel, residing at Weisingen, House #88 1/2, went to her daughter's, Mrs. Matt's house in Holzheim, to help her with domestic slaughtering, while Anna Gebel stayed at home with the children. At approximately 9:30 Anna arrived at Holzheim to pick up her mother's purse and mentioned that she intended to go to Augsburg. At approximately 10:30 Mrs. Gebel sent her married daughter, Katharina Matt, from Holzheim to her daughter Anna in Weisingen, House #88 1/2, to inform her that their mother had just severely sprained her back or hips and on instruction of her attending physician was to be admitted to the hospital in Dillingen immediately. Anna Gebel, Weisingen, replied to her married sister in House #88 1/2, Weisingen, that she was going to Augsburg anyway and used these words, "The children are none of my concern. You may kiss my ass, all of you," and left for Augsburg. Her whereabouts in Augsburg are unknown, nor has she returned to Weisingen to this date. This left the children without supervision or food, beginning at 10:30. As a result, the 4 above-mentioned Gebel children had to be taken to the Children's Home in Wittislingen that very day, which was arranged by the District Youth Welfare Department. According to information received from St. Elisabeth Hospital in Dillingen, Mrs. Maria Gebel will have to remain hospitalized for approximately 2 weeks. ./.

Therefore, the District Youth Welfare Office pressed criminal charges against Anna Gobel of Weisingen, H.#88 1/2, current whereabouts unknown (presumably in Augsburg), under the provisions of § 170 of the Penal Code. By intentionally and maliciously abandoning her own children, Renate and Michael, as well as those of her sister, Emma, Petra, and Walter, entrusted to her supervision, she deliberately failed in her supervisory responsibility. The fact that the children where not only completely famished but also clothed inadequately at the time they were picked up at their residence by Miss Stetter, social worker with the Public Health Department, is further proof of her having neglected her supervisory duties. The necessary clothing [for the children] had to be provided by the director of the children's home.

Public Guardian
s/ Rieder

(Rieder)
Officiating Chief Inspector

Nr.: II/4-432/27-1405,1426,
(bei Antwort bitte angeben) 1549,1578 R/B

An
die Landpolizei-Inspektion

888 Dillingen a.d.Donau

Betreff: Amtsvormundschaft über die Kinder
Gebel Petra, geb.21.7.1960 KM Emma Gebel
Gebel Walter, geb.26.1.1962
Gebel Renate, geb.19.5.1960 KM Anna Gebel
Gebel Michael, geb.18.7.1961

Das Kreisjugendamt Dillingen wurde am Freitag, den 31.1.64 gegen 14.00 Uhr durch den Herrn Bürgermeister der Gemeinde Weisingen davon unterrichtet, daß die in Weisingen Hs.Nr.88 1/2 wohnhaften Kinder sich selbst überlassen und ohne Aufsicht und Nahrung seien. Die Großmutter der Kinder, Frau Maria Gebel, mußte überraschend am Vormittag des 31.1.64 ins Krankenhaus in Dillingen eingeliefert werden. Die mit der Aufsicht aller Kinder beauftragte Tochter Anna Gebel sperrte jedoch die Kinder ein und fuhr mit unbekanntem Ziel, vermutlich nach Augsburg, weg. Nach Darstellung von Frau Maria Gebel hat sich der Vorgang wie folgt zugetragen.

Am 31.1.64 ging Frau Maria Gebel, wohnhaft in Weisingen Hs. Nr.88 1/2 gegen 7.30 Uhr zu ihrer in Holzheim wohnenden Tochter Frau Matt, um dort beim Hausschlachten zu helfen. Zu Hause bei den Kindern war ihre Tochter Anna Gebel geblieben. Gegen 9.30 Uhr kam nun Anna nach Holzheim und holte die Handtasche der Mutter ab. Sie gab hierbei an, daß sie nach Augsburg wegfahren wolle. Gegen 10.30 Uhr schickte Frau Gebel ihre verheiratete Tochter Katharina Matt aus Holzheim zu der in Weisingen Hs.Nr.88 1/2 anwesenden Tochter Anna um dieser mitzuteilen, daß sich die Mutter eben im Rücken oder in den Hüften stark verzerrt habe und auf Weisung des behandelnden Arztes sofort ins Krankenhaus Dillingen eingeliefert werden müsse. Anna Gebel, Weisingen, teilte hierauf der verheirateten Schwester in der Wohnung Weisingen Hs.Nr.88 1/2 mit, daß sie trotzdem nach Augsburg wegfahren werde und erklärte wörtlich, "die Kinder gehen mich nichts an, ihr könnt mich alle am Arsch lecken". Anschließend fuhr sie dann nach Augsburg ab. Der Aufenthalt von Anna Gebel in Augsburg ist unbekannt. Sie ist auch bisher nicht nach Weisingen zurückgekehrt. Hierdurch waren die Kinder etwa ab 10.30 Uhr ohne Aufsicht und Verpflegung. Die Folge davon war, daß die 4 obengenannten Kinder Gebel noch am gleichen Tage durch das Kreisjugendamt Dillingen in das Kinderheim Wittislingen verbracht werden mußten. Frau Maria Gebel wird nach Mitteilung des Krankenhauses St.Elisabeth in Dillingen etwa 2 Wochen dort verbleiben müssen.

Das Kreisjugendamt erstattet daher gegen Anna Gebel — Weisingen Hs.Nr.88 1/2 zur Zeit unbekannten Aufenthalts (vermutlich in Augsburg) Strafanzeige gem. § 170 d StGB. Anna Gebel hat sowohl ihre eigenen Kinder Renate und Michael, als auch die ihrer Aufsicht anvertrauten Kinder ihrer Schwester Emma, Petra und Walter vorsätzlich und böswillig verlassen und hierdurch ihre Aufsichtspflicht vorsätzlich verletzt. Ein weiterer Beweis der Vernachlässigung ihrer Aufsichtspflicht ist darin zu sehen, daß die Kinder, als sie durch die Fürsorgerin beim Staatl.Gesundheitsamt, Frl.Stetter, in der Wohnung in Weisingen abgeholt wurden nicht nur völlig ausgehungert, sondern auch nur ungenügend bekleidet waren. Die erforderlichen Kleidungsstücke mußten erst durch die Heimleitung in Wittislingen beschafft werden.

Der Amtsvormund
gez.Rieder

(Rieder)
Reg.Oberinspektor

EXHIBIT 12

XII 51/64 Dillingen/Danube, 02/17/1964

The County Court of Dillingen/Danube
Guardianship Court

--in the case of

Gebel Petra, Walter, Renate, and Michael, all from Weisingen, Rural District of Dillingen/Danube

issues the following

Order:

Gebel Petra, born 07/21/1960,
Gebel Walter, born 01/26/1962,
Gebel Renate, born 05/19/1960,
Gebel Michael, born 07/18/1961,
last residing in Weisingen, House #88, Roman Catholic, legally represented by the District Youth Welfare Office of Dillingen/Danube,

are to be delivered into the temporary custody of the Welfare Department.

Reasons:

Petra and Walter Gebel were born to their mother Emma Gebel and Renate and Michael Gebel to their mother Anna Gebel, out of wedlock. For three of the children no father could be ascertained. Neither of the two mothers is holding a steady job. Maria Gebel, mother of the children's mothers, who cared for the four children until recently, did so inadequately, which resulted in their hospitalization because of dystrophy. Subsequently, they were admitted into a home for children at the expense of public welfare. Currently, their grandmother is hospitalized and will no longer be physically able to care for the children. They were left in Weisingen without supervision, sufficient clothing or food. Anna Gebel, who should have looked after the children, did not take care of them, nor did her sister.

In view of both sisters' unsettled lifestyle, no future improvement of their children's lot can be expected.

The above facts were substantiated in a report submitted by the District Youth Welfare Office of Dillingen.

Under the circumstances as described, it is absolutely essential that the children be entrusted to the care of social welfare and committed to a children's home. Any other way of caring for them would be unsatisfactory. By the same token, being reared under the care of social welfare is not a hopeless prospect.
The above decision became necessary under the provisions of §§ 64 & 67 of the Youth Protection Act.

signed: Wagewnhuber
Director, County Court

02/24/64
[signatures illegible]

[Stamp:] Dillingen, Feb. 25, 1964
County Court of Dillingen/Danube
- Guardianship Court -
[signed:] Unger
Judicial Officer

Das Amtsgericht Dillingen/Donau
Vormundschaftsgericht

erlässt in Sachen

Gebel Petra, Walter, Renate und Michael, sämtliche aus Weisingen, Landkreis Dillingen/Donau

wegen Fürsorgeerziehung

folgenden

Beschluss:

Gebel Petra, geb. am 21. 7. 1960,
Gebel Walter, geb. am 26.1.1962,
Gebel Renate, geb. am 19.5.1960,
Gebel Michael, geb. am 18.7.1961
zuletzt wohnhaft in Weisingen, Haus-Nummer 8d, römisch katholisch, gesetzlich vertreten durch das Kreisjugendamt Dillingen/Donau
werden der vorläufigen Fürsorgeerziehung überwiesen.

Gründe:

Gebel Petra und Walter sind von ihrer Mutter Gebel Emma, Gebel Renate und Michael sind von ihrer Mutter Gebel Anna unehelich geboren. Bei drei Kindern konnte ein Erzeuger nicht festgestellt werden. Die Kindsmütter gehen keiner geregelten Arbeit nach. Die Personensorge für ihre Kinder übernahm [illegible] die Mutter der beiden Kindsmütter, [illegible] Gebel, in Weisingen. Die Großmutter vermochte jedoch schon bisher ihre vier Enkel nur unzulänglich zu betreuen, so daß die Kinder wegen Ernährungsstörungen in einem Krankenhaus und später in einem Kinderheim untergebracht werden mussten. Die Kosten hierfür traf die öffentliche Fürsorge. Nunmehr musste die Großmutter in ein Krankenhaus eingeliefert werden; sie ist künftig gesundheitlich nicht mehr in der Lage, ihre Enkel zu betreuen. Diese blieben ohne Aufsicht, ohne genügende Bekleidung und Nahrung in Weisingen zurück. Anna Gebel, welche sich [illegible] der hätte annehmen müssen, kümmerte sich nicht um sie, ebensowenig ihre Schwester. Bei dem ungeregelten Lebenswandel der beiden Schwestern ist auch künftig nicht zu erwarten, daß sich das Los ihrer Kinder bessern werde.

Dieser Sachverhalt ist durch einen Bericht des Kreisjugendamtes Dillingen glaubhaft gemacht.

Unter den gegebenen Verhältnissen ist Fürsorgeerziehung und Heimeinweisung der Kinder unerläßlich. Andere Erziehungsmittel reichen nicht aus. Andererseits ist Fürsorgeerziehung nicht aussichtslos.

Es war daher gem. §§ 64, 67 J G zu entscheiden, wie geschehen.

gez.: Jagenhuber
Amtsgerichtsdirektor

24. 2. 54

Dillingen, den 25. Feb. 1954
Amtsgericht Dillingen a/Donau
Vormundschaftsgericht

EXHIBIT 13

Rural District Office
Dillingen on the Danube
Phone: 455,456,457 **888** **Dillingen on the D.**
# II/4-432/27- **03/03/1964**
(to be referred to in any reply) R/Wg

To: County Court
- Guardianship Court -

888 Dillingen on the Danube

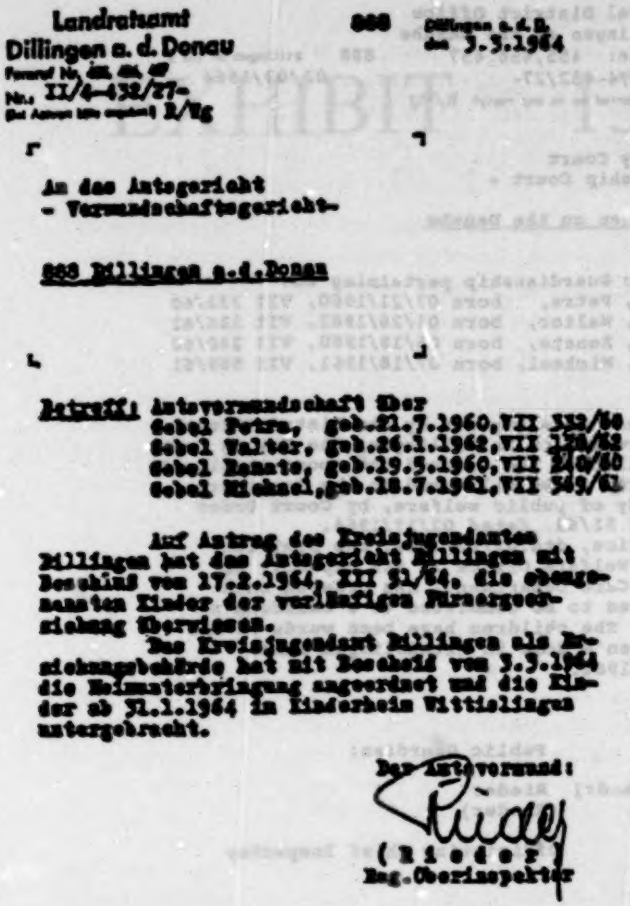
Re: Public Guardianship pertaining to:
Gebel, Petra, born 07/21/1960, VII 332/60
Gebel, Walter, born 01/26/1962, VII 126/62
Gebel, Renate, born 05/19/1960, VII 240/60
Gebel, Michael, born 07/18/1961, VII 569/61

Pursuant to a request by the District Youth Welfare Office in Dillingen, the County Court of Dillingen has ordered the above-mentioned children to be delivered to the temporary custody of public welfare, by Court Order Nr.XII 51/64, dated 02/17/1964.
By notice, dtd.03/03/1964, the District Youth Welfare Office in its capacity as Youth-Care Department, has ordered said children to be committed to a children's home. The children have been wards of the Children's Home in Wittislingen since 01/31/1964.

Public Guardian:

[signed:] Rieder
(Rieder)

Officiating Chief Inspector



Landratsamt
Dillingen a. d. Donau
Fernruf Nr. [illegible]
Nr.: II/4-432/27-
(Bei Antwort bitte angeben!) R/Hg

888 Dillingen a. d. D.
den 3.3.1964

An das Amtsgericht
- Vormundschaftsgericht-

888 Dillingen a.d.Donau

Betreff: Amtsvormundschaft über
Gebel Petra, geb.21.7.1960,VII 332/60
Gebel Walter, geb.26.1.1962,VII 128/62
Gebel Renate, geb.19.5.1960,VII 240/60
Gebel Michael,geb.18.7.1961,VII 369/61

Auf Antrag des Kreisjugendamtes Dillingen hat das Amtsgericht Dillingen mit Beschluß vom 17.2.1964, XII 31/64, die obengenannten Kinder der vorläufigen Fürsorgeerziehung überwiesen.

Das Kreisjugendamt Dillingen als Erziehungsbehörde hat mit Bescheid vom 3.3.1964 die Heimunterbringung angeordnet und die Kinder ab 31.1.1964 im Kinderheim Wittislingen untergebracht.

Der Amtsvormund:
Rieder
(R i e d e r)
Reg.Oberinspektor

VII 126/62
County Court of Dillingen/D.
XII 51/64 Dillingen/D., 06/25/1964

In the case of

Gebel, Petra, born 07/21/1960; Walter, born 01/26/1962;
Renate, born 05/19/1960; Michael, born 07/18/1961--

Subject: Public Welfare as Custodian of Children

the County Court/Guardianship Court of Dillingen/Danube,

issues the following

Court Order:

1) **Gebel**, Petra, born 07/21/1960,
2) **Gebel**, Walter, born 01/26/1962,
3) **Gebel**, Renate, born 01/19/1960
4) **Gebel**, Michael, born 07/18/1961,

1) and 2) born out of wedlock to Emma Gebel; 3) and 4) born out of wedlock to Anna Gebel, both residing in Augsburg, Schönbachstrasse 98/0,

--all of the above children being legally represented by the District Youth Welfare Office in Dillingen/Danube--

are to be delivered permanently into the custody of Public Welfare.

[Stamp:] Dillingen, July 2, 1964
County Court of Dillingen/Danube
- Guardianship Court -
[signed:] Unger
Judicial Officer

Reasons.

Per Court Order issued on 02/17/1964, said children were turned over to the temporary custody of Public Welfare. The facts underlying said order were verified by both mothers. as well as the grandmother of the children. Therefore, no further evidence is needed. Reference is made to the contents of said court order.

Prior to issuance of present court order for permanent custody of the children by Public Welfare, both mothers, grandmother, the District Youth Welfare Office, and Municipal & Church authorities were heard.

According to expert medical opinion, the children are fit to live in a children's home.

signed: Wagenhuber, County Court Director

[illegible seal] Attested by County Court Registry. signed: Baue

Amtsgericht Dillingen/D.
XII 51/64

Dillingen/D., den 25. 6. 1964.

In Sachen

Gebel Petra, geb. 21.7.1960, Walter, geb. 26.1.1962, Renate, geb. 19.5.1960, Michael, geb. 18.7.1961,

wegen Fürsorgeerziehung

erlässt das Amtsgericht-Vormundschaftsgericht Dillingen/Donau folgenden

Beschluss:

1) **Gebel** Petra, geboren am 21.7.1960,
2) **Gebel** Walter, geboren am 26.111962,
3) **Gebel** Renate, geboren am 19.1.1960,
4) **Gebel** Michael, geboren am 18.7.1961

zu 1 und 2 uneheliche Kinder von Gebel Emma, zu 3 und 4: uneheliche Kinder von Gebel Anna, beide wohnhaft in Augsburg, Schönbachstrasse 98/0,

sämtliche Kinder gesetzlich vertreten durch das Kreisjugendamt Dillingen/Donau

werden der Fürsorgeerziehung endgültig überwiesen.

1) K.g.
2) z. d. Fürs. Bl. 4

Gründe.

Ausgef. den, -2. Juli 1964
Amtsgericht Dillingen/Donau
– Vormundschaftsgericht –
Rechtspfleger

Mit Beschluss vom 17.2.1964 wurde die vorläufige Fürsorgeerziehung der Kinder angeordnet. Die Tatsachen, auf welche diese Anordnung gestützt wurde, wurden von den Kindsmüttern und der Grossmutter der Kinder als richtig anerkannt. Es bedarf daher keiner weiteren Beweise. Auf den Inhalt des Beschlusses wird Bezug genommen.

Vor der Anordnung der endgültigen Fürsorgeerziehung wurden die beiden Kindsmütter, die Grossmutter der Kinder das Kreisjugendamt, die Gemeinde und die kirchliche Behörde gehört

Nach ~~erziehungsärztlichen~~ ärztlichen Gutachten eignen sich die Kinder für Heimerziehung.

Da die Gründe für die Anordnung der Fürsorgeerziehung fortbestehen, war daher zu entscheiden wie geschehen. Das Verfahren ist gebührenfrei (§§ 64,65,JWG., 76 JWG.)

gez. Jagenhuber
Amtsgerichtsdirektor

Zur Beglaubigung
Geschäftsstelle des Amtsgerichts.

EXHIBIT 15

to be unable to proceed any further in this matter."

Pursuant to Court Order X 51/64, dated 02/17/1964, issued by the County Court of Dillingen, the child Walter Gebel was delivered into the custody of Public Welfare. Permanent custidy by public welfare was ordered on 06/25/1964. The boy was admitted into the Wittislingen Children's Home, where he remained until 07/11/1966.

Expenses incurred for the care in the Children's Home had to be covered by the Social Assistance Department of the District of Swabia in Augsburg and effective 01/01/1966 by the Rural District Office/District Youth Welfare Office in Dillingen on the Danube. Beginning in January 1966, the monthly child support of DM 25.00, to which the child's mother was entitled for her son Walter, was channeled into the District Youth Welfare Office. The monthly sum of DM 150.00 in child support received by this office was turned over to the District Youth Welfare Office as reimbursement for expenses incurred by the Children's Home.

A court order issued by the County Court of Dillingen on 06/30.1966, rescinded the previous order for public-welfare care, since circumstances had changed. On 03/18.1966, the child's mother entered into matrimony with Masie Lee Lagrand, member of the US Armed Forces, before the Magistrate in Pohl-Göns. On 07/11/1966, Walter was returned to his mother.

There was no ward-estate in trust.

The Rural District Office-District Youth Welfare Office attests the correctness and completeness of the above information. Enclosed, we return the Certificate of Appointment, dated 03/27/1962.

Public Guardian

[signed:] Rieder
(Rieder)
Officiating Chief Inspector

Disposition

1) Copy of the Final Report to be send to the child's mother;

2) affix appointment coupon;

3) close out file and keep on record.

Dillingen/Danube, 10/21/1966
County Court

[signed:] Teigl
(Teigl)
Judicial Officer

Nr. II/a–432/27–1578 Hö/Wr.
(Bei Antwort bitte angeben)

Amtsgericht Dillingen
19.XI.1966

An
das Amtsgericht
– Vormundschaftsgericht –

888 Dillingen a.d.Donau

Betreff: Amtsvormundschaft über Walter Bernhard Gebel, geb.26.1.1962
Dort.Az.:VII 126/62

Beilage: – 1 –

Mit Beschluß des Amtsgerichts Dillingen vom 27.7.1966 wurde der Mutter, Frau Emma Lagrand geb.Gebel, wohnhaft in Pohl-Göns, 6309 Windhofstr.37, die elterliche Gewalt über ihren Sohn Walter Gebel übertragen. Die Amtsvormundschaft ist damit beendet.

Es wird folgender

Schlußbericht

erstattet. Die Vaterschaft zu dem Kinde konnte nicht festgestellt werden. Als Erzeuger wird von der Kindesmutter der amerikanische Staatsangehörige Molina Tirso Lopez, der früher in der Sheridan-Kaserne in Augsburg stationiert war, beansprucht. Der Genannte kehrte Ende August 1961 nach USA zurück. Seine Heimatanschrift war der Kindesmutter nicht bekannt. Wegen der Feststellung der Vaterschaft wurde das Deutsche Institut für Vormundschaftswesen in Heidelberg, eingeschaltet, das am 18.2.1963 folgendes anher mitgeteilt hat:

" In Ihrer Unterhaltssache Walter Bernhard Gebel / Tirso Molina-Lopez haben sich unsere Korrespondenten in den USA intensiv bemüht, den als Kindesvater benannten Tirso Molina-Lopez zur Anerkennung der Vaterschaft mit Unterhaltsverpflichtungserklärung heranzuziehen. Nachdem der Kindesvater auf die an ihn gerichteten Aufforderungen nicht antwortete, wurde die vorgesetzte Armeedienststelle eingeschaltet. Unter dem 23.1.1963 erging eine Mitteilung des Departement of the Army, wonach Mr. Molina-Lopez inzwischen aus dem aktiven Militärdienst ausgeschieden ist. Das Armeeministerium vertritt daher die Ansicht, seine Zuständigkeit in dieser Sache sei nicht mehr gegeben. Diese Auffassung entspricht den geltenden US-Vorschriften. Nach diesen Vorschriften ist das Ministerium lediglich dazu angehalten, zu veranlassen, daß dem Kindesvater eine schriftliche Mitteilung in der Sache zugestellt wird. Dies ist geschehen. Der Kindesvater hat jedoch auch darauf nicht reagiert. Die Anschrift von ehemaligen US-Armeeangehörigen wird unter Hinweis

Da der derzeitige Aufenthalt des Kindesvaters nicht bekannt ist, sehen wir uns zu unserem Bedauern ausserstande, weitere Schritte in der Sache zu veranlassen".

Das Amtsgericht Dillingen hat mit Beschluß vom [illegible].2.1964 - X 51/64, das Kind Walter Gebel der Fürsorgeerziehung überwiesen. Die endgültige Fürsorgeerziehung wurde mit Beschluß vom 25.6.1964 angeordnet. Das Kind wurde am 31.1.1964 im Kinderheim in Wittislingen untergebracht, wo es sich bis 11.7.1966 befand.

Die entstandenen Heimkosten mußten von der Sozialhilfeverwaltung beim Bezirk Schwaben in Augsburg und ab 1.1.1966 vom Landratsamt - Kreisjugendamt Dillingen a.d.Donau übernommen werden. Das der Kindesmutter für ihren Sohn Walter zustehende Kindergeld in Höhe von monatl. 25.-- DM wurde ab Januar 1966 an das Kreisjugendamt Dillingen abgezweigt. Das hier eingegangene Kindergeld in Höhe von insgesamt 150.-- DM wurde vom Kreisjugendamt als Rückersatz für aufgewendete Heimkosten vereinnahmt.

Mit Beschluß des Amtsgerichts Dillingen vom 30.6.1966 wurde die angeordnete Fürsorgeerziehung aufgehoben, da ihr Zweck anderweitig sichergestellt ist. Die Kindesmutter hat sich am 18.3.1966 vor dem Standesamt in Pohl-Göns mit Kasie Lee Lagrand, Angehöriger der US-Streitkräfte, verehelicht. Am 11.7.1966 hat die Kindesmutter ihren Sohn Walter zu sich genommen.

Mündelvermögen wurde nicht verwaltet.

Das Landratsamt - Kreisjugendamt Dillingen versichert die Richtigkeit und Vollständigkeit vorstehender Angaben. Anliegend wird die Bestallungsbescheinigung vom 27.3.1962 zurückgereicht.

Der Amtsvormund

(R i e d e l)
Reg.Oberinspektor

Verfügung:

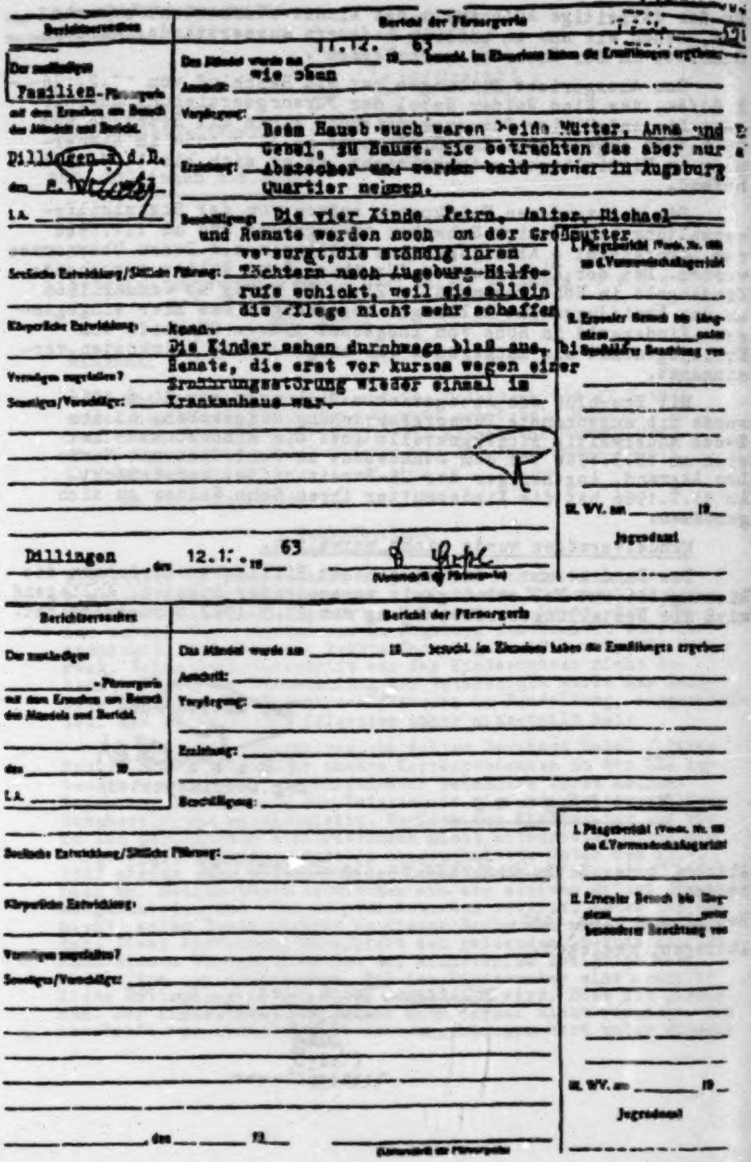
Abschrift des Schlußberichts an die Kindesmutter übersenden.

Bestallung einkleben.

Austragen, weglegen.

Dillingen/Donau, den [illegible]
Amtsgericht:

([illegible])
Rechtspfleger



Berichtsersuchen

Der zuständigen Familien-Fürsorgerin mit dem Ersuchen um Besuch des Mündels und Bericht.

Dillingen a.d.D.

den 8. [illegible] 1963

I.A.

Bericht der Fürsorgerin

Das Mündel wurde am 11.12. 19 63 besucht. Im Einzelnen haben die Ermittlungen ergeben:

Anschrift: wie oben

Verpflegung:

Beim Hausbesuch waren beide Mütter, Anna und E
Gebel, zu Hause. Sie betrachten das aber nur a

Erziehung: Abstecher an; werden bald wieder in Augsburg Quartier nehmen.

Beschäftigung: Die vier Kinde Petra, Walter, Michael und Renate werden noch von der Großmutter versorgt, die ständig ihren

Seelische Entwicklung/Sittliche Führung: Töchtern nach Augsburg Hilferufe schickt, weil sie allein die Pflege nicht mehr schaffen kann.

Körperliche Entwicklung: Die Kinder sehen durchwegs blaß aus, bi Renate, die erst vor kurzem wegen einer

Vermögen zugefallen? Ernährungsstörung wieder einmal im

Sonstiges/Vorschläge: Krankenhaus war.

Dillingen, den 12.12. 19 63

(Unterschrift der Fürsorgerin)

I. Pflegebericht (Vordr. Nr. ...) an d. Vormundschaftsgericht

II. Erneuter Besuch bis längstens ___ unter besonderer Beachtung von

III. WV. am ___ 19__

Jugendamt

Berichtsersuchen

Der zuständigen ___-Fürsorgerin mit dem Ersuchen um Besuch des Mündels und Bericht.

den ___ 19__

I.A.

Bericht der Fürsorgerin

Das Mündel wurde am ___ 19__ besucht. Im Einzelnen haben die Ermittlungen ergeben:

Anschrift:

Verpflegung:

Erziehung:

Beschäftigung:

Seelische Entwicklung/Sittliche Führung:

Körperliche Entwicklung:

Vermögen zugefallen?

Sonstiges/Vorschläge:

___, den ___ 19__

(Unterschrift der Fürsorgerin)

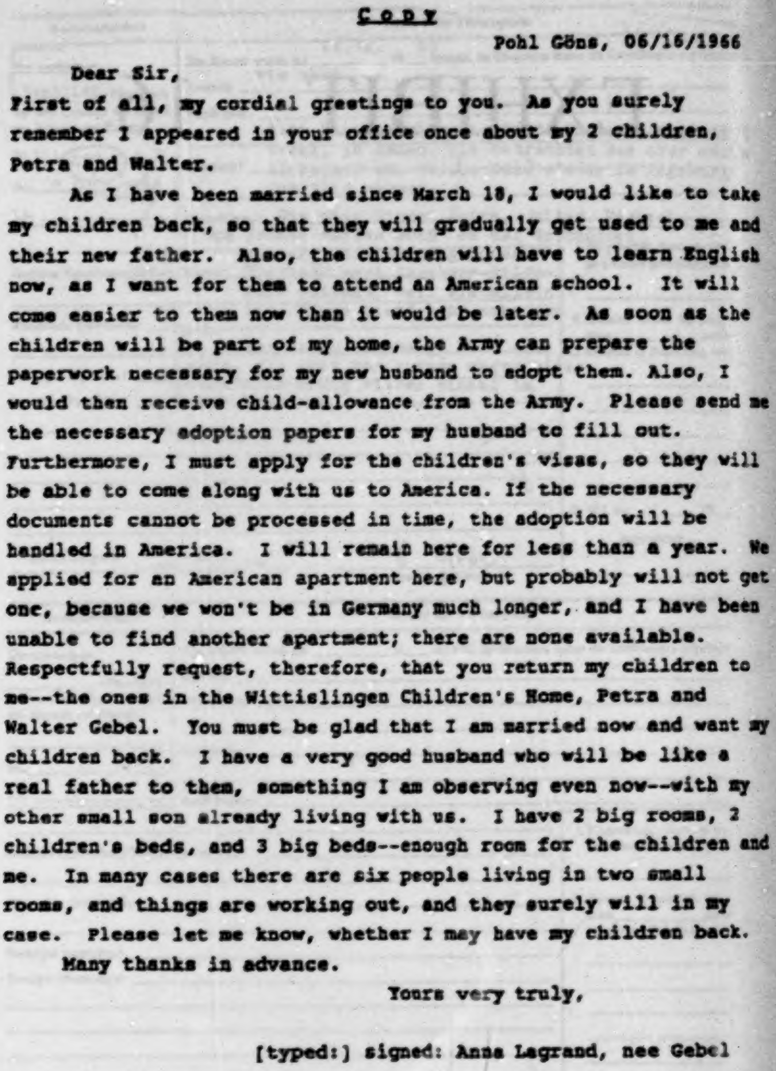
I. Pflegebericht (Vordr. Nr. ...) an d. Vormundschaftsgericht

II. Erneuter Besuch bis längstens ___ unter besonderer Beachtung von

III. WV. am ___ 19__

Jugendamt

EXHIBIT 16



Copy

Pohl Göns, 06/16/1966

Dear Sir,

First of all, my cordial greetings to you. As you surely remember I appeared in your office once about my 2 children, Petra and Walter.

As I have been married since March 18, I would like to take my children back, so that they will gradually get used to me and their new father. Also, the children will have to learn English now, as I want for them to attend an American school. It will come easier to them now than it would be later. As soon as the children will be part of my home, the Army can prepare the paperwork necessary for my new husband to adopt them. Also, I would then receive child-allowance from the Army. Please send me the necessary adoption papers for my husband to fill out. Furthermore, I must apply for the children's visas, so they will be able to come along with us to America. If the necessary documents cannot be processed in time, the adoption will be handled in America. I will remain here for less than a year. We applied for an American apartment here, but probably will not get one, because we won't be in Germany much longer, and I have been unable to find another apartment; there are none available. Respectfully request, therefore, that you return my children to me--the ones in the Wittislingen Children's Home, Petra and Walter Gebel. You must be glad that I am married now and want my children back. I have a very good husband who will be like a real father to them, something I am observing even now--with my other small son already living with us. I have 2 big rooms, 2 children's beds, and 3 big beds--enough room for the children and me. In many cases there are six people living in two small rooms, and things are working out, and they surely will in my case. Please let me know, whether I may have my children back.

Many thanks in advance.

Yours very truly,

[typed:] signed: Anna Lagrand, nee Gebel

Abschrift

Pohl Göns, den 16.6.1966

Sehr geerter Herr.

Im Anfang meines Schreibens grüße ich Sie recht herzlich. Und möchte Ihnen folgendes mitteilen. Sie wissen doch, das ich schon einmal bei Ihnen war, wegen meinen 2 Kindern Petra und Walter.

Da ich doch jetzt schon seid dem 18.März Verheiratet bin, möchte ich die Kinder zu mir hohlen, damit sie sich langsam an mich gewöhnen und an meinen neuen Vater. Die Kinder müssen jetzt auch Englisch lernen, denn ich möchte sie in die Amischule geben, denn jetzt lernen es die Kinder noch leichter als später. Denn sobald sich die Kinder in meinen Haushalt befinden, dann kann die Armee die Papiere richten, das mein jetziger Mann sie als eigen an nimmt, u. dann bekomme ich auch das Geld von der Armee für die Kinder. Schicken Sie mir doch auch die Papier was ich dazu brauche zur Adoption, damit Sie mein Mann richten kann. Denn ich muß doch auch die Papiere für die Kinder für das Visum richten, damit die Kinder mit nach Amerika können.Wenn die Papiere nicht mehr fertig werden bis dahin, dann kann auch die adoption in Amerika fertig gemacht werden.Denn ich bin ja kein Jahr mehr hier. Ich habe auch wegen den Amerikanischen Wohnungen eingegeben, aber wir bekommen warscheinlich keine solche Wohnung mehr, weil wir nicht mehr lang in Deutschland haben, u. keine andere Wohnung fand ich noch nicht, es ist keine frei. Daher möchte ich Sie bitten, geben Sie mir meine Kinder raus, die in Wittislingen im Heim sind Petra und Walter Gebel. Denn Sie müssen doch jetzt froh sein, das ich jetzt Verheiratet bin, u.meine Kinder zu mir hohlen möchte. Ich habe einen sehr guten Mann, der ist zu den Kindern bestimmt wie ein eigener Vater, das sehe ich doch, da ich doch meinen anderen kleinen Sohn bei mir habe. Ich habe 2 große Zimmer. u.2 Kinderbetten, u.3 große Betten, da habe ich mit den Kindern schon platz, andere Leute wohnen zu 6 in zwei kleinen Zimmer u.bei denen geht es auch, warum nicht bei mir. Also geben Sie mir Bescheid, ob ich die Kinder hohlen kann.

Im voraus besten Dank.

Hochachtungsvoll
gez.Anna Lagrand geb.Gebel

EXHIBIT 17

Children's Home
8881 Wittislingen

06/20/1966

To: Rural District Office - District Youth Welfare Department
888 Dillingen/Danube
#II/40435/4-18-21/1964
Hö/Wr.

Reference: Status Report on the Gebel Children:
Petra, born 07/21/1960
Walter, born 01/26/1962
Renate, born 05/09/1960
Michael, born 07/18/1961

The Gebel children have been living in Wittislingen since 01/31/1964. Their physical and mental development is normal, and they are healthy.

They enthusiastically attend the local preschool nursery, and the two girls will attend Elementary School beginning in September.

Petra: is a very nervous child and talks excessively. For the rest, she is easygoing, minds, and is good-natured.

Walter: He is full of life, boisterous, and does not mind at all. Particularly conspicuous is his craving for sweets. He continuously begs other children, also grownups, for candy. For the rest, he is good-natured, easygoing, and generally well-liked by the other children.

Renate: is a taciturn child and won't talk much. She minds, is good-natured, and easygoing.

Michael: Curiosity, jealousy, and hypersensitivity play a major role. On the other hand--like all of the Gebel children--he is very good-natured and easygoing.

The children are very much attached to one another. They like their stay in our Home and are a pleasure to have around, especially the two girls.

Director in Charge of Home

EXHIBIT 18

[Translation from German]

County Court of Dillingen
on the Danube
- Guardianship Court -

Dillingen/Danube, 07/11/66

File Reference: VII 126/62

In the case of

a) Gebel, Petra, born 07/21/1960
b) Gebel, Walter, born 01/26/1962
c) Gebel, Karl-Heinz, [born] 10/10/1963.

Mrs. Emma Lagrand, nee Gebel, residing at #37 Windhofstr. in Pohl-Göns, the children's mother--identified by her knowledge of the facts underlying this case.

Mrs. Emma Lagrand declared:

On 03/18/1966, I entered into matrimony with Sergeant Masie Lee Lagrand, a member of the US Military Forces, before the Magistrate of Pohl-Göns.

As a result of my marriage, my personal circumstances have improved decisively. I am now in a position to receive my children into my home and raise them properly. My husband has agreed to accept my children into our matrimonial home. He wishes to adopt the children, as soon as circumstances permit.

On 01/02/1967, I will emigrate to the USA with my husband and my children.

Therefore, I request that parental custody of the above-mentioned children be restored to me.

My being awarded parental custody will be in the children's best interest, as continued guardianship following my emigration to the USA would entail major difficulties.

The District Youth Welfare Office of Dillingen/Danube has given its consent to the above arrangement.

r.a.& s.[=read, approved & signed]

[signed:] Emma Lagrand

Closed [by]:

[signed:] Wigl
(Wigl)
Reviewing Judicial Inspector

Aktenzeichen: VII 126/66

In Sachen

a) Gebel Petra, geb. 21.7.1960
b) Gebel Walter, geb. 26.1.1962
c) Gebel Karl-Heinz, 10.10.1963

findet sich die Kindsmutter Frau Emma Lagrand, geb. Gebel, wohnh. in Pohl-Göns, Windhofstr. 37, ausgewiesen durch Sachkenntnis,

Frau Emma Lagrand erklärte:

Ich habe mich am 18.3.1966 vor dem Standesamt in Pohl-Göns mit dem Sergeant der US-Streitkräfte Masie Lee Lagrand verheiratet.

Infolge meiner Verehelichung haben sich meine persönlichen Verhältnisse entscheidend verbessert. Ich bin nunmehr in der Lage, die Kinder in meinen Haushalt aufzunehmen und sie ordentlich zu erziehen. Mein Ehemann ist mit der Aufnahme meiner Kinder in den ehel. Haushalt einverstanden. Er will die Kinder adoptieren, sobald die Voraussetzungen geschaffen sind.

Ich wandere am 2.1. 1967 mit meinem Ehemann und meinen Kinder in die USA aus.

Aus diesen Gründen stelle ich den

Antrag

die elterliche Gewalt über meine oben aufgeführten Kinder auf mich zu übertragen.

Die Übertragung der elterlichen Gewalt auf mich dient dem Besten der Kinder, da die Weiterführung der Vormundschaft nach meiner Auswanderung nach den USA mit größten Schwierigkeiten verbunden sein würde.

Das Kreisjugendamt Dillingen/Do. ist mit dieser Regelung einverstande

v.g.u.u.

Geschlossen: Emma Lagrand

(W[illegible]l)
Just.Insp.zA.

EXHIBIT 19

COPY

Rural District Office
Dillingen on the Danube

888 Dillingen on the Danube, 07/05/1966
Phone: 455, 456, 457.

II/4-432/27-1426+1578 R/B
(to be referred to in your reply)

To: The County Court
- Guardianship Court -

888 Dillingen

Reference: Public Guardianship pertaining to:
Gebel, Petra Christine, born 07/21/1960 &
Gebel, Walter Bernhard, born 01/26/1962.

Subject: Transfer of full parental custody to children's mother, Emma Lagrand, nee Gebel, residing in Pohl-Göns, District of Friedberg/Hesse

The District Youth Welfare Office of Dillingen is the public guardian of both aforementioned children. As a result of neglect, their transfer into the custody of public welfare became necessary. Note: Court Order #X 51/64, issued on 02/17/1964.

In the meantime, the children's mother got married. Some time ago she appeared before the District Youth Welfare Office in Dillingen requesting the return of her children from the Wittislingen Children's Home into her care, claiming that her husband was willing to accept them into his home. Another illegitimate child whose guardian is the Municipal Youth Office in Augsburg, is already a member of her household.

An inquiry conducted within the community of her present residence revealed nothing detrimental about her. At this point she is obviously ready to care for her children properly, having sufficient time at her disposal to do so, since she has found a husband.

The children's mother's husband, Mr. Masie Lee Lagrand is a member of the US Armed Forces stationed in Germany. He is due to be transferred back to the United States in the beginning of next year, which is a determining factor as regards the children's return. Mr. Lagrand is willing to accept the children into his household and--according to their mother--even to adopt them. While the latter still remains an open issue, Mrs. Lagrand definitely intends to take both children with her to the United States. With the children no longer living in Germany, continued guardianship would be a mere formality.

Therefore, request transfer of full parental custody to the mother, Mrs. Emma Lagrand. An application, dated 06/27/1966, for

rescinding custody by Public Welfare has already been filed with the County Court in Dillingen.

Public Guardian

s/ Rieder
(Rieder)
Officiating Chief Inspector

[Handwritten:]

I. Court Order.

Parental custody of Gebel, Walter Bernhard, born 01/26/1962 in Dillingen/Danube, is to be transferred to the mother, Mrs. Emma Legrand, nee Gebel, in Pohl-Göns, District of Friedberg/Hesse.

[Initials] II. Individuals to be notified of Section I, above:

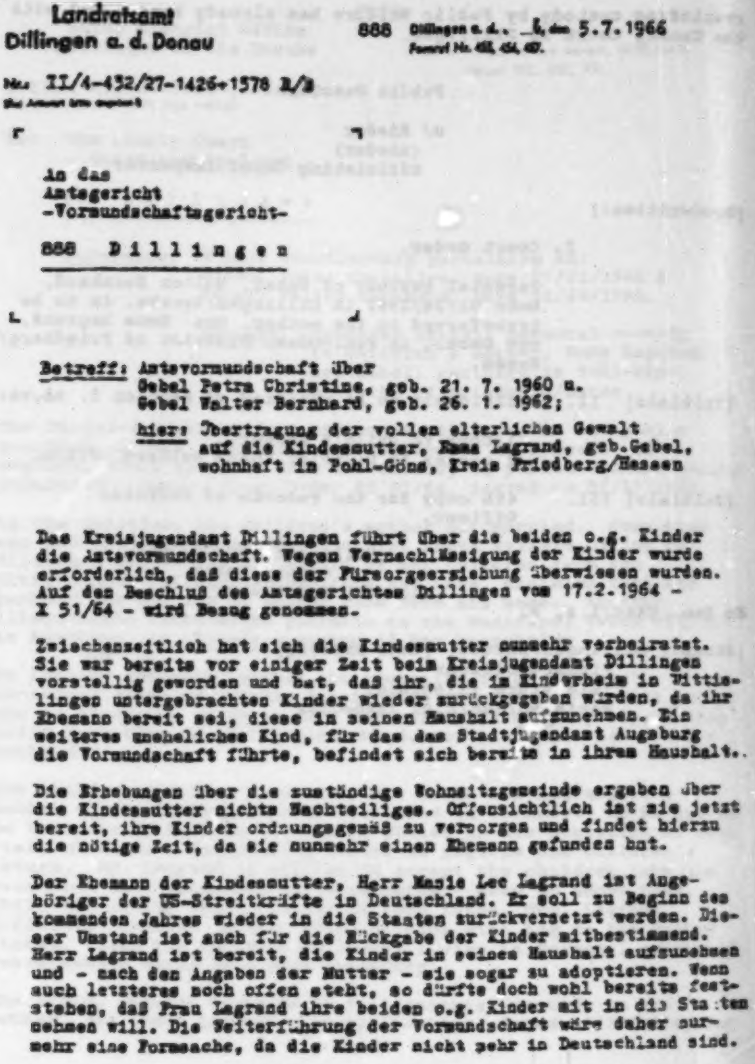
1 copy to child's mother,
2 copies to District Youth Welfare Office,

[Initials] III. 4th copy for the records of Judicial Officer.

Dillingen, 07/27/1966
County Court
[signed:] Wagenhuber

No fee, §§44/I,4, 91

[Stamp:] Dillingen/Danube, [date missing]
Finance Officer
[signature illegible]
Reviewed/Judicial Inspector



Landratsamt
Dillingen a. d. Donau

888 Dillingen a. d. D., den 5.7.1966
Fernruf Nr. 433, 434, 437.

Nr.: II/4-432/27-1426+1578 R/B
(Bei Antwort bitte angeben)

An das
Amtsgericht
-Vormundschaftsgericht-

888 Dillingen

Betreff: Amtsvormundschaft über
Gebel Petra Christine, geb. 21. 7. 1960 u.
Gebel Walter Bernhard, geb. 26. 1. 1962;
hier: Übertragung der vollen elterlichen Gewalt
auf die Kindesmutter, Emma Lagrand, geb.Gebel,
wohnhaft in Pohl-Göns, Kreis Friedberg/Hessen

Das Kreisjugendamt Dillingen führt über die beiden o.g. Kinder die Amtsvormundschaft. Wegen Vernachlässigung der Kinder wurde erforderlich, daß diese der Fürsorgeerziehung überwiesen wurden. Auf den Beschluß des Amtsgerichtes Dillingen vom 17.2.1964 - X 51/64 - wird Bezug genommen.

Zwischenzeitlich hat sich die Kindesmutter nunmehr verheiratet. Sie war bereits vor einiger Zeit beim Kreisjugendamt Dillingen vorstellig geworden und bat, daß ihr, die im Kinderheim in Wittislingen untergebrachten Kinder wieder zurückgegeben würden, da ihr Ehemann bereit sei, diese in seinen Haushalt aufzunehmen. Ein weiteres uneheliches Kind, für das das Stadtjugendamt Augsburg die Vormundschaft führte, befindet sich bereits in ihrem Haushalt.

Die Erhebungen über die zuständige Wohnsitzgemeinde ergaben über die Kindesmutter nichts Nachteiliges. Offensichtlich ist sie jetzt bereit, ihre Kinder ordnungsgemäß zu versorgen und findet hierzu die nötige Zeit, da sie nunmehr einen Ehemann gefunden hat.

Der Ehemann der Kindesmutter, Herr Masie Lee Lagrand ist Angehöriger der US-Streitkräfte in Deutschland. Er soll zu Beginn des kommenden Jahres wieder in die Staaten zurückversetzt werden. Dieser Umstand ist auch für die Rückgabe der Kinder mitbestimmend. Herr Lagrand ist bereit, die Kinder in seinen Haushalt aufzunehmen und - nach den Angaben der Mutter - sie sogar zu adoptieren. Wenn auch letzteres noch offen steht, so dürfte doch wohl bereits feststehen, daß Frau Lagrand ihre beiden o.g. Kinder mit in die Staaten nehmen will. Die Weiterführung der Vormundschaft wäre daher nunmehr eine Formsache, da die Kinder nicht mehr in Deutschland sind.

Demzufolge wird beantragt, der Mutter, Frau Emma Lagrand, die volle elterliche Gewalt zu übertragen. Die Aufhebung der bestehenden Fürsorgeerziehung wurde beim Amtsgericht Dillingen bereits mit Schreiben vom 27.6.1966 beantragt.

Der Amtsvormund

gez.Rieder

(Rieder)
Reg.Oberinspektor

I. Beschluß

Die elterliche Gewalt über Gebel Walter Bernhard, geboren am 26.1.1956 in Dillingen/Donau, wird der Mutter, Frau Emma Lagrand, geb. Gebel, in [illegible], Kreis Friedberg in Hessen, übertragen.

II. Mitt. v. I an 1. Kindesmutter,
2. Kreisjugendamt hier,

B. juli.1966

III. H. Rechtspfleger z. w. Verf.

Dillingen, 27. VII. 1966
Amtsgericht

Gebühren §§ 94/I, 4, 91 KostO.

Dillingen/Donau, den
Der Kostenbeamte:
Justizinspektor z. A.

EXHIBIT 20

District Rural Office
Dillingen on the Danube 888 Dillingen/Donau, 10/14/1966

Phone: 455, 456 457.

# II/4-432/27-1578 hö/wR.
(to be referred to in any reply) **[SEAL:] County Court**
October 19, 1966
Dillingen (Danube)

To: County Court
- Guardianship Court -

888 Dillingen on the Danube

Reference: Guardianship/Walter Bernhard Gebel,
born 01/26/1962
Your file reference: VII 126/62

Enclosure: - 1 -

Pursuant to Court Order dated 07/27/1966, issued by the County Court of Dillingen, parental custody of son Walter Gebel has been turned over to his mother, Mrs.Emma Lagrand, nee Gebel, residing at #6309 Windhofstr. in Pohl-Göns, which terminates the public guardianship status. The following is a

Conclusive Report

Child's paternal affiliation could not be established. The child's mother claims US Citizen Molina Tirso Lopez, formerly stationed at Sheridan-Barracks, Augsburg, to be the father. Said individual returned to the United States in August of 1961. The child's mother did not know his home address. In order to determine paternal affiliation, the German Guardianship Institute in Heidelberg was contacted, which on 02/18/1963 provided the following information:

"Re: child support case of Walter Bernhard Gebel/ Tirso Molina-Lopez; our correspondents in the USA made concentrated efforts to approach Tirso Molina Lopez, named as the child's father, about his acknowledging paternity and responsibility for child support. When he failed to respond to any such request, his Army superiors were contacted. According to information dated 01/23/1963, received from the Department of the Army, Mr. Molina-Lopez has been discharged from active military service. Therefore, under the provisions of existing US regulations, the Department of the Army feels, it no longer has any jurisdiction over this case. The only responsibility incumbent upon the Department of the Army is to send a written notification about the matter to the child's father, which it did; however, again the child's father failed to respond. In consideration of confidentiality with respect to personnel files,

to be unable to proceed any further in this matter."

Pursuant to Court Order X 51/64, dated 02/17/1964, issued by the County Court of Dillingen, the child Walter Gebel was delivered into the custody of Public Welfare. Permanent custidy by public welfare was ordered on 06/25/1964. The boy was admitted into the Wittislingen Children's Home, where he remained until 07/11/1966.

Expenses incurred for the care in the Children's Home had to be covered by the Social Assistance Department of the District of Swabia in Augsburg and effective 01/01/1966 by the Rural District Office/District Youth Welfare Office in Dillingen on the Danube. Beginning in January 1966, the monthly child support of DM 25.00, to which the child's mother was entitled for her son Walter, was channeled into the District Youth Welfare Office. The monthly sum of DM 150.00 in child support received by this office was turned over to the District Youth Welfare Office as reimbursement for expenses incurred by the Children's Home.

A court order issued by the County Court of Dillingen on 06/30.1966, rescinded the previous order for public-welfare care, since circumstances had changed. On 03/18.1966, the child's mother entered into matrimony with Masie Lee Lagrand, member of the US Armed Forces, before the Magistrate in Pohl-Göns. On 07/11/1966, Walter was returned to his mother.

There was no ward-estate in trust.

The Rural District Office-District Youth Welfare Office attests the correctness and completeness of the above information. Enclosed, we return the Certificate of Appointment, dated 03/27/1962.

Public Guardian

[signed:] Rieder
(Rieder)
Officiating Chief Inspector

Disposition

1) Copy of the Final Report to be send to the child's mother;

2) affix appointment coupon;

3) close out file and keep on record.

Dillingen/Danube, 10/21/1966
County Court

[signed:] Teigl
(Teigl)
Judicial Officer

Dillingen a. d. Donau

888 Dillingen a. d. Do [illegible]
Fernruf Nr. 423, 424, 425

Nr. II/4-432/27-1578 Hö/Wr.
[illegible]

Amtsgericht Dillingen
19.XII.1966

An
das Amtsgericht -
- Vormundschaftsgericht -

888 Dillingen a.d.Donau

Betreff: Amtsvormundschaft über Walter Bernhard Gebel, geb.26.1.1962

Dort.Az.:VII 126/62

Beilage: - 1 -

Mit Beschluß des Amtsgerichts Dillingen vom 27.7.1966 wurde der Mutter, Frau Emma Lagrand geb.Gebel, wohnhaft in Pohl-Göns, 6309 Windhofstr.37, die elterliche Gewalt über ihren Sohn Walter Gebel übertragen. Die Amtsvormundschaft ist damit beendet.

Es wird folgender

Schlußbericht

erstattet. Die Vaterschaft zu dem Kinde konnte nicht festgestellt werden. Als Erzeuger wird von der Kindesmutter der amerikanische Staatsangehörige Molina Tirso Lopez, der früher in der Sheridan-Kaserne in Augsburg stationiert war, beansprucht. Der Genannte kehrte Ende August 1961 nach USA zurück. Seine Heimatanschrift war der Kindesmutter nicht bekannt. Wegen der Feststellung der Vaterschaft wurde das Deutsche Institut für Vormundschaftswesen in Heidelberg, eingeschaltet, das am 18.2.1963 folgendes anher mitgeteilt hat:

" In Ihrer Unterhaltssache Walter Bernhard Gebel / Tirso Molina-Lopez haben sich unsere Korrespondenten in den USA intensiv bemüht, den als Kindesvater benannten Tirso Molina-Lopez zur Anerkennung der Vaterschaft mit Unterhaltsverpflichtungserklärung heranzuziehen. Nachdem der Kindesvater auf die an ihn gerichteten Aufforderungen nicht antwortete, wurde die orgesetzte Armeedienststelle eingeschaltet. Unter dem 23.1.
)63 erging eine Mitteilung des Departement of the Army, wo-
ach Mr. Molina-Lopez inzwischen aus dem aktiven Militärdienst
sgeschieden ist. Das Armeeministerium vertritt daher die An-
cht, seine Zuständigkeit in dieser Sache sei nicht mehr gege-
1. Diese Auffassung entspricht den geltenden US-Vorschriften.
h diesen Vorschriften ist das Ministerium lediglich dazu
halten, zu veranlassen, daß dem Kindesvater eine schrift-
itteilung in der Sache zugestellt wird. Dies ist gesche-
Kindesvater hat jedoch auch darauf nicht reagiert. Die
t von ehemaligen US-Armeeangehörigen wird unter [illegible]

Da der derzeitige Aufenthalt des Kindesvaters nicht bekannt ist, sehen wir uns zu unserem Bedauern ausserstande, weitere Schritte in der Sache zu veranlassen".

Das Amtsgericht Dillingen hat mit Beschluß vom 17.2.1964 - X 51/64, das Kind Walter Gebel der Fürsorgeerziehung überwiesen. Die endgültige Fürsorgeerziehung wurde mit Beschluß von 25.6.1964 angeordnet. Das Kind wurde am 31.1.1964 im Kinderheim in Wittislingen untergebracht, wo es sich bis 11.7.1966 befand.

Die entstandenen Heimkosten mußten von der Sozialhilfeverwaltung beim Bezirk Schwaben in Augsburg und ab 1.1.1966 vom Landratsamt - Kreisjugendamt Dillingen a.d.Donau übernommen werden. Das der Kindesmutter für ihren Sohn Walter zustehende Kindergeld in Höhe von monatl. 25.-- DM wurde ab Januar 1966 an das Kreisjugendamt Dillingen abgezweigt. Das hier eingegangene Kindergeld in Höhe von insgesamt 150.-- DM wurde vom Kreisjugendamt als Rückersatz für aufgewendete Heimkosten vereinnahmt.

Mit Beschluß des Amtsgerichts Dillingen vom 30.6.1966 wurde die angeordnete Fürsorgeerziehung aufgehoben, da ihr Zweck anderweitig sichergestellt ist. Die Kindesmutter hat sich am 18.3.1966 vor dem Standesamt in Pohl-Göns mit Masie Lee Lagrand, Angehöriger der US-Streitkräfte, verehelicht. Am 11.7.1966 hat die Kindesmutter ihren Sohn Walter zu sich genommen.

Mündelvermögen wurde nicht verwaltet.

Das Landratsamt - Kreisjugendamt Dillingen versichert die Richtigkeit und Vollständigkeit vorstehender Angaben. Anliegend wird die Bestallungsbescheinigung vom 27.3.1962 zurückgereicht.

Der Amtsvormund
Rieder
(R i e d e r)
Reg.Oberinspektor

Verfügung:

1) Abschrift des Schlußberichts an die Kindesmutter übersenden.

2) Bestallung einkleben.

3) Abtragen, weglegen.

Dillingen/Donau, den [illegible]
Amtsgericht:
(Weig)
Rechtspfleger

Annex MG 52

AFFIDAVIT OF KELLEY HENRY

STATE OF ARIZONA)
)
County of Pima)

I, KELLEY HENRY, upon my oath depose and state as follows:

1. I am an attorney at the Office of the Federal Public Defender in Tucson, Arizona. I am licensed to practice law in the State of Missouri. I am admitted to practice law in the State of Missouri, the United States District Courts for the Western District of Missouri and the District of Arizona, and the Ninth Circuit Court of Appeals. I have represented men charged with capital crimes in Missouri and Arizona. I have lectured at the national and state level on issues regarding the death penalty. My office was appointed to represent Walter LaGrand on February 26, 1999. In that capacity we immediately began a background investigation of Walter LaGrand and prepared and filed several state and federal petitions on his behalf.

2. During the time that I represented Walter LaGrand, the German government was also working extensively on his behalf. For example, the German Ambassador, Dr. Jürgen Chrobog, made a personal plea to Governor Jane D. Hull on Walter's behalf. In addition, German officials met with the clemency board and visited with Walter.

3. German consular assistance would have been essential to collecting mitigating evidence for Karl and Walter LaGrand before their sentencing hearing in 1984. Much of the available evidence was located in state agencies, therefore governmental assistance was necessary to cut through bureaucratic obstacles and access the records. The German government did help collect important background records located in Germany for Walter LaGrand in 1993. My office filed these documents as exhibits to Walter's Third Petition for Postconviction Relief, filed on March 2, 1999.

4. The background records obtained with Germany's assistance in 1993 were important not only in and of themselves, but also because they led to the collection of significant mitigating evidence in the United States. Because of vital statistics contained in those records, my office was able to locate Walter's biological and adoptive fathers. Both men readily signed affidavits in support of Walter's petition. Walter's biological father provided critical information regarding the behavior of Walter's mother - including the fact that she drank while she was pregnant with Walter.

5. German consular assistance would also have been crucial in developing evidence regarding the effects of racism and cultural isolation on Walter and Karl, both biracial children of different fathers, born to an unwed German mother in Germany in the early 1960's. Competent trial counsel would have looked to Germany for assistance in locating social historians and academic scholarship to support this line of mitigating evidence. If my office had had more time, we would have worked with the German consulate to develop this argument which we considered important and compelling.

6. Had their trial counsel presented a complete case for mitigation, the LaGrands likely would not have been sentenced to death. Their crime, as opposed to serial murders or other particularly heinous crimes, was the type of offense for which a strong case for mitigation is often successful in avoiding the death penalty. Consequently, here, the importance of investigating, developing and presenting a complete case at sentencing was paramount.

Affiant further sayeth not.

Dated this 18th day of August, 1999.

Kelley J. Henry
Kelley Henry

SUBSCRIBED AND SWORN TO me
this 18th day of August, 1999.

Notary Public

OFFICIAL SEAL
SOPHIA BECKMAN

Annex MG 53

AFFIDAVIT OF JEANNETTE LAURA SHELDON

DECLARATION OF JEANNETTE LAURA SHELDON

I, Jeannette L. Sheldon, declare as follows,

1. I am an investigator for the Office of the Federal Public Defender's Capital Habeas Unit. On February 28, 1999, I interviewed Weaver James Barkman, Jr. in Tucson, Arizona.

2. Mr. Barkman told me that he is a former Deputy Sheriff for the Pima County Sheriff's Department in Tucson. He said he was employed by the Pima County Sheriff's Department for over 14 years. During his service to the Sheriff's Department, he worked as a uniformed officer, a detective, and a member of the Intelligence Unit.

2. Mr. Barkman told me that in January of 1982, while working in the Intelligence unit, he interviewed Karl Lagrand twice about a bank robbery which had occurred some hours earlier in Marana, AZ.

3. On both occasions, Mr. Barkman said that Karl Lagrand said that Karl and his brother, Walter, had planned to rob the bank together. Mr. Barkman said that Karl also told him that Karl and Walter had planned that no one would get hurt during the robbery.

4. Mr. Barkman explained that, in both interviews he conducted with Karl in January of 1982, Karl was extremely upset. Mr. Barkman said that Karl said that he alone had killed the bank manager and stabbed Dawn Lopez. Mr. Badkman remembered that Karl repeated the exact story in each confession, and each time Karl stated he alone was responsible for the attacks.

5. Based on his skill and experience in conducting such interviews, Mr. Barkman told me that, throughout the interviews, he found no reason to disbelieve Mr. LaGrand's rendition of the events in the bank.

6. Mr. Barkman said that this case has always disturbed him because, in all of his years of experience as a law enforcement officer, and in his experience investigating many violent crimes, he has never considered this particular crime to warrant the death penalty.

7. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated this 3rd day of March 1999.

Jeannette L. Sheldon

Annex MG 54

AFFIDAVIT OF TIRSO MOLINA LOPEZ

Declaration of Tirso Molina Lopez

I, Tirso Molina Lopez declare under penalty of perjury the following to be true to the best of my information and belief:

1. My name is Tirso Molina Lopez and I am the biological father of Walter Bernhard LaGrand. Presently, I reside in Las Vegas, Nevada.

2. I was born in 1941 in Puerto Rico. My parents, Maria Lopez and Thomas Molina, were never married. My paternal aunt, Maria Molina, helped raise me. She died approximately seventeen years ago of natural causes.

3. My father was in the Merchant Marines and traveled extensively for work. He died approximately twenty years ago from a heart attack.

4. I was raised by my father. We lived in Puerto Rico until I was three years old and moved to New York.

5. On my father's side I have two siblings: a younger sister named Lisa Molina who is a housewife and lives in Puerto Rico and a younger brother named Thomas Molina who works as a security guard and lives in Las Vegas. I am not in touch with Lisa but I occasionally see Thomas.

6. On my mother's side I have two older sisters: Analda Perez who lives in Florida and Fatima Negron who lives in New Jersey. They are both retired.

7. While I was growing up, my mother had no contact with me. No one ever explained to me why she had nothing to do with me.

8 When I was six or seven years old my father married a woman named Maria Gonzalez. They were married in Puerto Rico.

9. When I was seven years old I was sent to live at the St. Agnes reformatory home in Sparkhill, New York. My first-cousin, Thomas, was also sent to the home. Thomas and I were

very close -- he was almost like a brother to me. Thomas passed away ten to twelve years ago.

10. I spent five years at the St. Agnes home. The home was run by nuns and the children were divided into three groups based on age. When I arrived at the home I was in the youngest group of boys. There were approximately five hundred boys at St. Agnes. The nuns were strict -- and disciplined me by hitting me with a bamboo stick that had tape on it. Sometimes a nun would bend you over and hit you or she would hit you on your fingertips with a ruler. I was hit pretty frequently.

11. During the time that I was at St. Agnes I did not go home for visits. However, my father and step-mother did visit me. I saw my father approximately every three months -- whenever he was back from a trip. My step-mother visited me every two weeks.

12. I left St. Agnes when I was about twelve. Thomas and I returned to New York and I lived with my father and step-mother. I still hung around on the streets. I attended school but I did not like it. I was a C and D student. A few years later my family moved back to Puerto Rico.

13. We moved to Caraguena, the town that my father's family is from. Since we were back in Puerto Rico I asked my father if I could see my biological mother. He agreed and took me to Guayama to meet her. When we got up to Guayama, my mother was no longer living there. We met her mother who told us that she lived in New Jersey and that she had been in New York all that time.

14. I enlisted in the Army when I was seventeen. I knew that troops from Puerto Rico were being sent to New Jersey. Part of the reason I joined was to be able to see my mother in New Jersey.

15. When I was stationed at Ft. Dix in New Jersey I did meet my mom. She came to my camp around midnight. I did not have any feelings for her when I met her -- there was no

connection or attachment. In a way, it was disappointing to meet her because she also did not seem to feel anything for me. She came up to see me some weekends and I sometimes went down and stayed with her. However, there was not much connection between us; I did not have a bond with her.

16. I was in the Army for two years. From Ft. Dix I went to the Aberdeen proving grounds and from there I was sent to Germany. I did not like the army.

17. In 1961 I was stationed in Augsburg, Germany for nine months. I worked as a supply specialist, which meant that I issued and took back all of the gear for soldiers coming into and going out of Germany. I lived on the military base during this time.

18. I was in Germany for three or four months before I met Emma Gebel. I met Emma when she was with a group of friends in a restaurant in Augsburg. I was between the age of 18 and twenty when I met her and she was around the same age. We started talking and then began going out on weekends. We would go to dances and bars. Emma did not use drugs but she did drink beer.

19. Emma told me that she was from another town that was out in the country. During the time that I knew her she stayed in an apartment in Augsburg with one of her girlfriends. I do not remember the name of her friend. Emma bounced back and forth between the apartment and the town that she was from originally. She would be gone for a few days at a time.

20. I did not know anything about Emma or her family. I went out with Emma for five or six months total. Emma and I dated for a couple of weeks before we had sex. When we did have sex and go out, I would give her money – $20 or $30, whatever I had. She did not ask me for the money but I figured that she might need it. I thought she could use the money because her clothes were used and she did not seem to be in really good health. She would say that she was

fine but she seemed to be depressed a lot of the time. I would ask her what was wrong but she would never tell me anything and I didn't want to push her. Emma would just turn off and be quiet at times.

21. During the time that Emma and I saw each other she did not work. I do not think that she was seeing anyone else during this time. We saw each other mostly on the weekends, Saturday nights generally. I would take the trolley and meet her down at a local bar.

22. During the time that I dated Emma, she started to gain weight. She told me that she was going to have a baby.

23. When Emma was four or five months pregnant she said that the baby was mine. I felt that there was no way because we hadn't been together that long. I do not think that Emma was seeing anyone else romantically during this period of time. This would, in fact, make me the father of this baby.

24. I was never contacted by attorneys or investigators appointed to represent my son, Walter, at trial, on direct appeal or in post-conviction proceedings. Had any attorney or investigator contacted me, I would have disclosed the information stated in this declaration as well as other information.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 2 nd day of March, 1999.

Tirso Molina

Tirso Molina Lopez

Annex MG 55

AFFIDAVIT OF MASIE LEE LAGRAND

DECLARATION OF MASIE LEE LaGRAND

Masie Lee LaGrand declares under penalty of perjury, the following to be true to the best of his information and belief:

1. My name is Masie Lee LaGrand. I am a Reverend at the New Hope CME Church Christian, Methodist Episcopal. I have been a Reverend since 1981.

2. I have lived in Alabama since 1974. I currently live at 751 Railroad Street, Hurtsboro, Alabama.

3. I joined the U.S. Army in 1963 when I was nineteen years old as a Private, first class, and served in the 24th Infantry Division.

4. In 1964, while stationed in Augsburg, Germany, I met a woman by the name of Emma, who was working as a waitress at an off-post bar.

5. I became intimately involved with Emma because I was young and very lonely. I was mostly interested in a sexual relationship. Emma was approximately two years older than I. We were together for two years before we were married.

6. I married Emma in 1966, in Germany. I knew at that time that she had a child, Karl, who was in an adoption type of home. I did not know why he was in that home. Emma did not explain why. I was not aware that Emma had other children because she never mentioned it. I naturally assumed that Karl was her only child. We visited Karl three or four times, before we married. From 1964 to 1966, I did not know about Walter and Patricia. They were in the same adoption home, but separate from Karl. After our marriage, we brought Karl home to live with us as a family.

7. When Karl was in the foster home, he appeared shaky, abnormal, and seemed to suffer from some sort of involuntary shaking of his head, which he would often do, even during sleep. This behavior continued even after we brought him home. Emma told me she took him to the doctor regarding this condition but I did not believe her.

8. Emma never told me who Karl's father was. I do not believe that he and Emma were married.

9. After our marriage in 1966, I was ordered to training exercises in the field which took me away from my home for thirty days. Upon my return, I was shocked to discover that Emma had two other children living in our house. Emma told me that they were her children also but she never explained where they came from. I now had four dependants that I could not afford, particularly since Emma was no longer working. She later told me that Walter's father was a "Mexican." I was told that Patricia was purely German, and that her father had been a German Soldier.

10. Because of the added responsibility of additional two children, life became financially very difficult. In spite of this, Emma quit her waitress job to stay at home. During this time, we were living in the town of Augsburg, outside the benefit of the military base.

11. Our marriage started beautifully, as Emma and I got along very well together. However, it eventually became clear to me over time that Emma's lifestyle did not wholly match mine. For instance, although Emma no longer worked at the NCO club, she would very often go there to meet friends and have a good time. I would stay at home babysitting her children. Emma did not take very good care of her children, especially Karl and Walter. She paid a disportionate amount of attention to her daughter in comparison to the attention she gave to her sons. I would very often tell her that she needed to love the boys as she did Patricia, but she never listened. In fact, Emma was often verbally abusive to Karl and Walter, comparing them to Patricia and taunting them that neither one would ever amount to much. Emma seemed completely unconcerned about the welfare of her two sons. The combination of these factors, especially her abuse of the boys, soured our marriage and escalated our constant arguments into disaster.

12. Emma did not keep our home clean or the boys clean. Our home was always dirty, and unkept. During my work-related absences, the boys were dirty and unruly. However, Patricia was always well dressed and clean. I don't think that Emma was fully to herself. She would occasionally wash and clean but when a spell came, she would only take care of Patricia and ignore the boys.

13. I was transferred to Ft. Benning Georgia and moved my family with me. Before Karl started school, I sent Karl to live with my mother in Hatchechubbee, Alabama, as he was very young and I wanted him under my mother's care. Karl lived with my mother for one year and during this time I noticed a positive change in Karl, an improved and better attitude. Walter and Patricia stayed behind because they were old enough to attend school. Walter did considerably well and was attentive in school It was only when his mother's anger flared up that his behavior would worsen. During my field exercises, which took me away from the home for periods of time, the boys were neglected. Emma was not taking care of them, and mostly left them to take care of themselves, even at a very young age. Many times, the boys tried to escape Emma's horrible treatment of them. I remember several occasions in which the boys ran away from home and I had to go to the Police to help me locate them. The boys said they ran away because of the abusive treatment from their mother. Patricia was also verbally abusive to the boys. I often had to play the role of mediator between Emma, Patricia, and the boys. I always believed that the constant verbal abuse from Patricia, Emma, and the glaring absence of love and concern from their mother was terribly harmful to the boys.

14. During the next few years, the Army transferred me to Army posts in Texas, Arizona, and a return to Germany. I also completed two tours in Viet Nam. During my absences, I always sent Emma money to support our family and I believed that the money went to support our family. However, I always returned home to find that Emma had not used the money I sent to her for housekeeping purposes instead, she spent it on other things. Also, Emma had deeply indebted us through her carelessness with our money. Still, Emma continued to go to bars at night. During one period when I had returned to Germany, Emma and the children stayed

behind at Ft. Huachuca in Arizona. I frequently received notices and letters about the mounting debt Emma had built. I became very worried because I felt that would affect my Army career. I requested emergency leave status and got permission to escort two prisoners to Ft. Riley, Kansas. I paid my own way to Ft. Huachuca. I had not told Emma that I was coming home. I found out when I returned home that the boys were in the Arizona Boys Ranch. Our home was in shambles with girls' and mens' clothing scattered around. I discovered that Emma was a cocktail waitress at the NCO club, and carrying on with other men. I began to ask around the base about the children. A Major at the base had apparently taken an interest in the welfare of the boys and tried to get them into Church. He advised me to separate from Emma and to take custody of the boys. I decided to give Emma another chance, and returned to Germany to secure quarters for our family.

15. Back in Germany, we lived together again as a family. However, Emma was still going out to bars at night and gambling. I was trying to keep our family intact and make a go of our marriage, but regularly Emma was seeing other men, as I discovered in a letter from another man to Emma in which he joked about the good time they had spending my money. I confronted Emma with this letter. Later that night when she returned from Bingo, she attempted to stab me while I was sleeping with a sword she had just won at Bingo. She would have seriously wounded me had I not woken up and protected myself by pushing her out of a window.

16. All these events escalated to a point where my career was seriously compromised. In 1974, I was discharged from the Army because of the ongoing marital fights and history of indebtedness.

17. Emma and I were divorced in 1974. After that, I moved to Alabama where my family lived. I have not heard from or seen Emma or the children since the sword episode except through correspondence from Emma's attorneys. My mother remained in contact with Emma until her death in 1997.

18. After my divorce from Emma, the separation from her and the children, and my discharge from the Army, I suffered a nervous breakdown.

19. The news of Karl's and Walter's situation has saddened and hurt me very much, as I always cared for and wondered how they would do without me. I strongly believe that the combined abuse by Emma and Patricia put those boys to death. Had an attorney representing Walter contacted me at any time, I would have told him or her the information contained in this declaration.

I declare, under penalty of perjury, the foregoing to be true to the best of my information and belief.

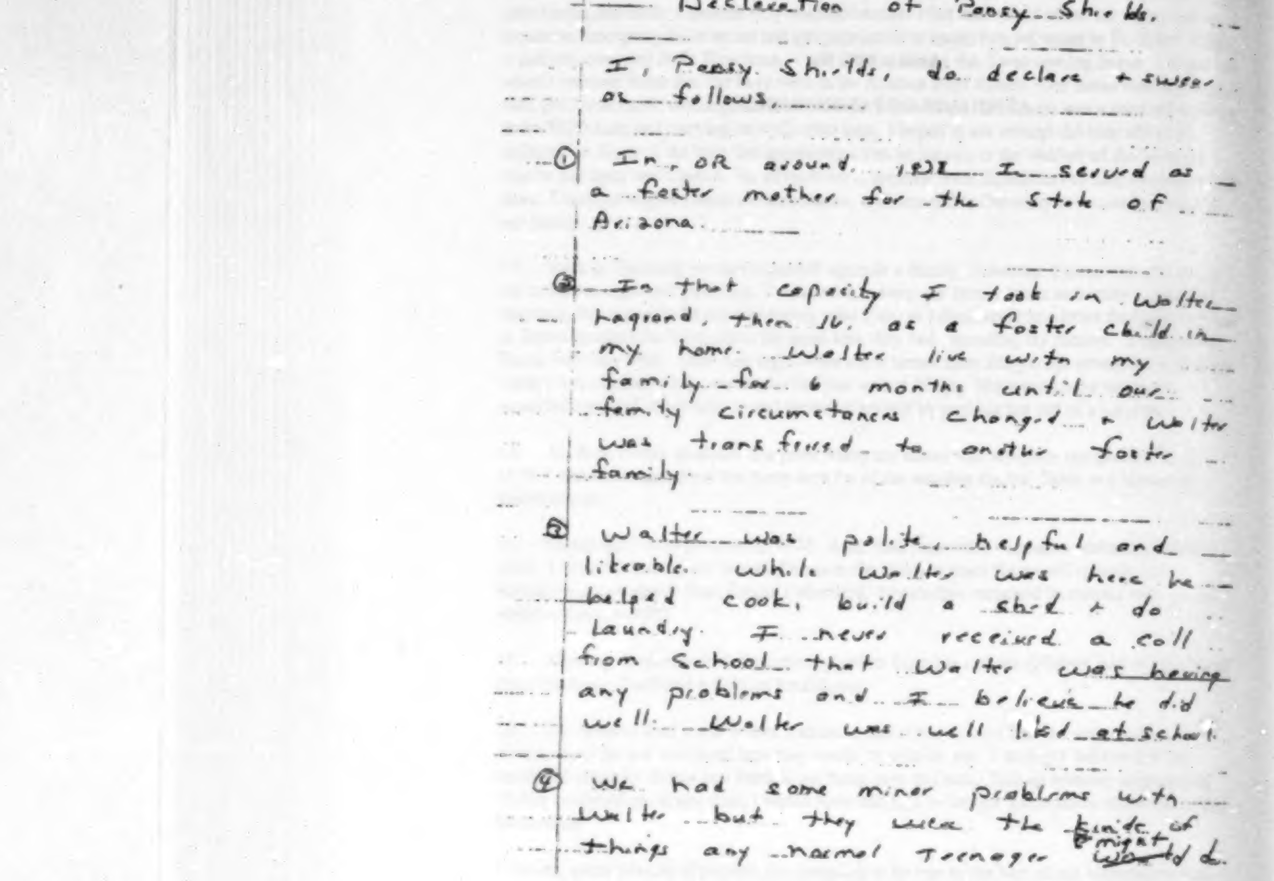
Dated this 1 day of March, 1999.

Marie L. LaGrand

Marie L. LaGrand

Annex MG 56

AFFIDAVIT OF PANSY SHIELDS



Declaration of Pansy Shields.

I, Pansy Shields, do declare + swear as follows.

① In, OR around, 1982 I served as a foster mother for the State of Arizona.

② In that capacity I took in Walter Lagrand, then 16, as a foster child in my home. Walter live with my family for 6 months until our family circumstances changed + Walter was transferred to another foster family.

③ Walter was polite, helpful and likeable. While Walter was here he helped cook, build a shed + do laundry. I never received a call from School that Walter was having any problems and I believe he did well. Walter was well liked at school.

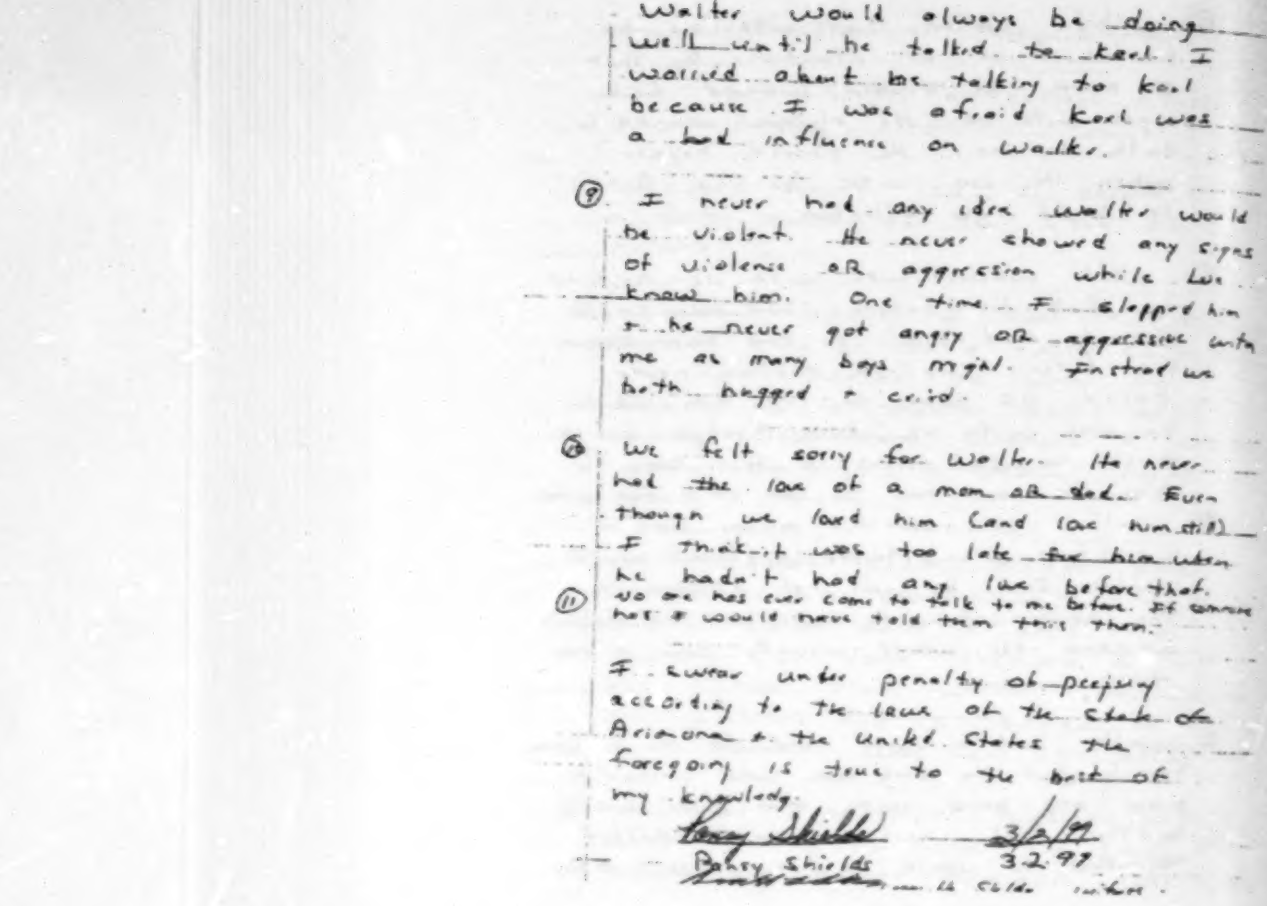
④ We had some minor problems with Walter but they were the kinds of things any normal Teenager ~~would~~ might do.

⑤ While Walter lived with us he needed a lot of attention. By that I mean, he always wanted to be right with me. He always wanted to talk to me. He seemed happier when he was with me. I felt he needed the attention.

⑥ While Walter was with us he tried to find his father. We were never able to find him. He had never known his father. Walter's mother never called OR came to see him while he was with us even though Walter tried to call her. I felt sorry for him. He never had the love of a mom or dad.

⑦ Walter told me his mother was a prostitute & entertained different men. Walter said he was not allowed in the house when he was at his mother's because she would usually have a man there.

⑧ Walter had a great need for his biologica family but the only one who seemed to have any bond with him was his brother Karl. When Walter talked to Karl he would be very upset after.



Walter would always be doing well until he talked to Karl. I worried about him talking to Karl because I was afraid Karl was a bad influence on Walter.

⑨ I never had any idea Walter would be violent. He never showed any signs of violence OR aggression while we knew him. One time I slapped him & he never got angry OR aggressive with me as many boys might. Instead we both hugged & cried.

⑩ We felt sorry for Walter. He never had the love of a mom OR dad. Even though we loved him (and love him still) I think it was too late for him when he hadn't had any love before that.

⑪ No one has ever come to talk to me before. If someone had I would have told them this then.

I swear under penalty of perjury according to the laws of the State of Arizona & the United States the foregoing is true to the best of my knowledge.

Patsy Shields 3/2/99
Patsy Shields 3.2.99
[illegible] witness.

Annex MG 57

AFFIDAVIT OF ADA I. BERRIOS

Declaration of Ada I. Berrios

I, Ada I. Berrios under penalty of perjury declare that the following information is true as follow:

1. That I am a paralegal specialist employed by the Federal Public Defender's Office, Capital Habeas Unit.

2. I received a call early Sunday morning of February 28, 1999 from Kelley Henry, one of the senior attorneys in our capital habeas unit to informed me that our office had just been appointed to represent Mr. Walter LaGrand in his Capital Habeas proceeding.

3. I was advised that Mr. Walter LaGrand had a scheduled execution date for March 3, 1999 and due to the time restraint we needed to proceed as soon as possible. Each working staff member at the unit was assigned specific tasks. My duty was mainly to obtain all background information on Mr. Walter LaGrand.

4. The following is a list of the places I have contacted thus far and the result of my search:

Request Date	Place Requested	Result
3/1/99	VisionQuest Lodgemakers - Tucson, AZ Youth Placement Facility	rec'd via fax: 16 pgs of accessment /evaluation reports from various social workers, youth counselor, and Drs.
3/1/99	Arizona Boys Ranch - Queen Creek, AZ Youth Placement and Treatment Facility	rec'd via messenger: appx 75pgs. accessment/evaluation progress report/ medical summary, treatment, education and family data.
3/2/99	Catalina High School [1976-1977]	rec'd. via fax: 2 pg transcript of records with forwarding information re: Bisbee H.S. Dept. Corr. Adobe Ranch. [2.2. Cum. Adverage]

Request Date	Place Requested	Result
3/2/99	Bisbee High School [1977 -1978]	rec'd via fax: 7 pg Transcript attached summary statement of behavior and academic skills. [2.2. cum.]
3/2/99	Pima County Juvenile Court -	Letter - via fax: 3/2/99 from James Orr, supervisor - Pima County Superior Court - "no records found"
3/2/99	Cochise County Juvenile Court -	Letter - via Fax. 3/2/99 from Patricia Durazo, Court Service Division Manager - "Records was formally destroyed by Court Order on 9/24/97.

5. I have also contacted several social workers who worked closely with Walter LaGrand and am presently waiting to obtain signed declarations from them as to their personal observations and recollection of Walter during his stay at Vision Quest. Two of these counselors are now living out of state. I have left messages for all of them, three of which have responded to my call, they appear to be very cooperative and are willing to assist in providing any assistance or information on behalf of Walter LaGrand.

6. It was my impression that one at least one of these counselors appeared upset that he had not been contacted sooner and suggested I contacted his partner who worked along with him and would be in a better position to provide more information, unfortunately, he would be out of town all week.

7. In addition, in reviewing the records I received from Arizona Boys Ranch, there are at least three other schools, medical facilities and staff personnel we need to contacted to obtain full and accurate background information on Walter LaGrand. Therefore, my research is incomplete and my attempt to locate records is still ongoing.

I declare under penalty of perjury that the foregoing is true.

Dated: 2nd day of March, 1999.

Ada I. Berrios

Annex MG 58

MICHAEL K. ADDO,
INTERIM MEASURES OF PROTECTION FOR RIGHTS UNDER THE VIENNA CONVENTION ON CONSULAR RELATIONS
(TO BE PUBLISHED IN 10 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 1999, NO. 4)

Interim Measures of Protection for Rights under the Vienna Convention on Consular Relations

Michael K. Addo*

Abstract
The majority of requests for the International Court of Justice to make interim orders of protection were registered between 1990 and 1999. Despite the increasing resort to this remedy, the full legal significance of ICJ interim measures remains a matter of continuing debate. The recent requests for and responses to ICJ interim measures to protect rights under the Vienna Convention on Consular Relations (Breard and LaGrand cases) have rekindled the debate as to the binding nature of such orders. Through a review of these recent cases, this article argues that the text of Article 41 of the Statute of the ICJ alone, under which interim orders are made, is an insufficient guide to the legal effect of the orders made thereunder. Despite the imprecision of the language of Article 41, there is sufficient evidence based on the principles of interpretation to lend weight to binding nature of ICJ provisional measures. It is clear from the review of the ceases that the direct impact of provisional measures on the protection of human rights makes this conclusion a compelling one. The article also reviews the consequences of the United States response ICJ orders.

1. Introduction

The last time the International Court of Justice (IC) was called upon to adjudicate on questions relating to diplomatic and consular relations was in the *Iranian Hostages* case[1] in 1980. The United States, as the applicant in that case, requested and was granted a declaration by the Court to the effect that, by its conduct, the Islamic Republic of Iran had violated its obligations under *inter alia,* the Vienna Convention on Diplomatic Relations (1961)[2] and the Vienna Convention on Consular Relations

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* School of Law, University of Exeter. I am grateful to Professor John Bridge and Dr Hélène Lambert of the School of Law, University of Exeter, for reading through an earlier draft of this paper. I found their comments invaluable. Any remaining errors are however entirely mine.

[1] United States Diplomatic and Consular Staff in Tehran (*USA v. Iran*) ICJ Reports, 1980, 3. For the decision on provisional measures, see, ICJ Reports, 1979, 7

[2] Done on 24 April 1961 500 U.N.T.S. 95.

(1963).[3] Eighteen years on (1998/1999), the tables have been turned and the United States stands accused before the same court of two instances of violations of the Vienna Convention on Consular Relations.[4] However, the interest in these cases exceeds the simple fact that the United States is accused of breaches of international law; they also raise important questions of treaty interpretation, the place of international law in a domestic forum (especially, in this context, a federal jurisdiction), the legal significance of interim measures and, the consequences of the pervasive impact of international human rights standards. Most of these questions are expected to be addressed at the merits stage of the *LaGrand*[5] case but, already, the activities at the preliminary stages of both cases raise important international law issues. This article assesses some of the issues raised by the litigation before the domestic and international tribunals.

2. Litigation before the International Court of Justice

In April 1998 and March 1999, Paraguay and Germany respectively filed applications before the Court against the United States of America (USA)[6] alleging violations of Articles 5[7] and 36[8] of the Vienna Convention on Consular Relations.[9]

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[3] Done on 24 April 1963 596 U.N.T.S. 262.

[4] The first case, The Case Concerning the Vienna Convention on Consular Relations (*Paraguay v. USA*) has been discontinued at the request of Paraguay.(ICJ, *Press Communiqué 98/36* of 11 November 1998). The Second case, LaGrand (*Germany v. USA*), is still pending before the Court. See, for details, www.icj-cij.org.

[5] *Ibid.*

[6] *Ibid.*.

[7] Article 5 of the Vienna Convention on Consular Relations (1963) *loc. cit.* provides *inter alia* that:
'Consular functions consist in:

(a) protecting in the receiving State the interests of the sending State and of its national, both individuals and bodies corporate, within the limits permitted by international law;

(i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests.'

Both applicants maintained that nationals of their respective countries (Angel Francisco Breard in the case of Paraguayan and Karl and Walter LaGrand in the German case), who had been convicted of serious criminal offences in the United States were not informed, as required by Article 36 (1) b of the Vienna Convention, of their right to contact consular officials in the United States. Further, consular officials had not been notified of the arrests and detention. In both cases, the accused were, at the time of the applications, facing the death penalty and all domestic remedies had been exhausted. Paraguay and Germany both asked the Court to adjudge and declare *inter alia* that:

1. the United States is obliged not to rely on its domestic law, especially the doctrine of 'procedural default' to preclude the exercise of rights under the Vienna Convention on Consular Relations;
2. the criminal liability imposed on the accused in violation of international law should be recognised by United States authorities as void;
3. the United States restore the *status quo ante* that is re-establish the situation which existed before the breach of the Vienna Convention on Consular Relations.[10]
4. the United States provide guarantees of the non-repetition of the illegal acts;
5. Applicants are entitled to reparation for the illegal acts.[11]

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[8] Article 36 (1)(b) of the Vienna Convention on Consular Relations (1963) provides that:
'1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.'

[9] Done on 24 April 1963 596 U.N.T.S. 262.

[10] In the German application, this claim was restricted to Walter LaGrand because Karl LaGrand had already been executed.

[11] Paraguay claimed *restitutio in integrum* while Germany focused on compensation for the execution of Karl LaGrand on 24 February 1999.

The jurisdiction of the Court was, according to the applicants, founded on Article 36(1) of the Statute of the Court[12] and on Article 1 of the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes.[13] As the United States had all but conceded the breaches of the Convention, the above issues may be encapsulated under the broad heading of the consequences of such a breach. As the Convention itself does not identify any particular consequences, the conclusions of the Court in this regard would be of immense academic and practical interest.

3. Provisional Measures

Meanwhile, considering the imminence of the scheduled execution dates at the time of the applications,[14] the Court was also requested to order provisional measures restraining the United States from implementing the death sentences while the cases were under consideration by the Court.[15] Both applications argued the grounds for their requests and the possible consequences of its dismissal in terms similar to the following from the Paraguayan application:

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[12] Article 36(1) of the Statute embodies the so-called compulsory jurisdiction of the Court and it provides that:
'The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and Conventions in force.'

[13] Done at Vienna, 24 April 1963. 596 U.N.T.S. 488 (1963). Article 1 of the Optional Protocol provides that:
'Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being Party to the present Protocol.'

[14] The Paraguayan application was filed on the 3 April 1998 and Angel Breard was scheduled to be executed on the 14 April 1998. Walter LaGrand was scheduled to be executed on 3 March 1999, a day after Germany initiated its litigation against the United States.

[15] See Case Concerning the Vienna Convention on Consular Relations (*Paraguay v. USA)* Request for the Indication of provisional Measures (9 April 1998) hereafter referred to as the *Breard* case (Application for Provisional Measures) and Case Concerning the Vienna Convention on Consular Relations (*Germany v. USA)* Request for the Indication of Provisional Measures (3 March 1999), hereafter referred to as the *LaGrand* case (Application for Provisional Measures). See, for details, www.icj-cij.org.

> 'Under the grave and exceptional circumstances of this case, and given the paramount interest of Paraguay in the life and liberty of its national, provisional measures are urgently needed to protect the life of Paraguay's national and the ability of this Court to order the relief to which Paraguay is entitled: restitution in kind. Without the provisional measures requested, the United States will execute Mr Breard before this Court can consider the merits of Paraguay's claims, and Paraguay will be forever deprived of the opportunity to have the *status quo ante* restored in the event of a judgment in its favour.'[16]

In the case of Paraguay this request was granted a few days later after an oral hearing.[17] The German request for interim measures, on the other hand, was granted by the Court *proprio motu* in accordance with the powers conferred by Article 75(1) of the Courts Rules of Procedure.[18] The order was made without having heard argument from the parties. The Court justified this unprecedented action on account of the urgency of the situation.[19]

The United States unsuccessfully contested both applications for provisional measures, with an opportunity to set out its arguments during the oral hearings of the *Breard* case. Considering the similarity of issues in the two cases, it is conceivable that arguments similar to those presented in the *Breard* case would have been relied upon in the *LaGrand* case had there been an opportunity to do so. At the oral hearings to consider the application for provisional measures in the *Breard* case, the United States relied on three broad arguments, relating to the jurisdiction of the Court, equality of arms and public policy.

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[16] *Ibid.*, para. 8

[17] The Court decided that:
'The United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all measures which it has taken in implementation of this Order.' *Ibid.*, para. 41.

[18] Article 75(1) of the Rules of Procedure provide that:
'1. The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties.'

[19] See, *LaGrand* case, *supra*, note 15 para. 12. The proposal not to hear argument was originally made by Germany.

A. Jurisdiction

In contesting Paraguay's application for provisional measures, the United States argued that the Court had no jurisdiction to hear the case. This was based on two separate but related contentions. Firstly, the Court had no jurisdiction to hear the case because there was no dispute between the parties as to the interpretation or application of the Vienna Convention on Consular Relations. As far as the United States was concerned, both parties were *ad idem* that Article 36 of the Convention conferred the rights of notification identified in the Paraguayan application. Furthermore, the United States had conceded the omission to notify Mr Breard of his rights, and the Paraguayan consul of Mr Breard's arrest and detention. In recognition of the error of her ways the United States had already apologised to Paraguay for the omission and had also undertaken to ensure that the omissions do not occur in the future.[20] In the same vein, Paraguay's objections to the criminal proceedings against Mr Breard do not constitute a dispute concerning the interpretation of the Convention

The second string to the jurisdiction argument was that, as it appears that Paraguay's arguments will not enable her to be successful on the merits of the case, provisional measures should not be ordered.[21] In support of this contention the United States reasoned that although the accused was not informed of his rights under the Vienna Convention, he had received all the necessary legal assistance, had understood the nature of the criminal proceedings and had also admitted his guilt. Therefore, consular assistance would not have made much difference to the outcome. In addition, Paraguay had no legally cognisable claim to the relief sought in her application. There was no entitlement to *restitutio in integrum* under the terms of the Vienna Convention on Consular Relations[22] and, further, the invalidation of criminal conviction for which Paraguay stood in her application has no foundation in the text or *travaux preparatoires* of the Vienna Convention on Consular Relations nor in State practice. The State practice in matters of Article 36(1) notifications is uneven and failures to notify are often remedied by apology. In any case, according to the United States, such a penalty would be unworkable in practice.[23]

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[20] *Bread* case, *supra*, note 15, para. 28
[21] See, generally, *ibid.* para. 20

Since the *Fisheries Jurisdiction* cases, the Court has consistently held that it is not necessary for it to conclusively satisfy itself that it has jurisdiction on the merits of a case in order to be able to indicate provisional measures, although, it ought not make indications for provisional measures if the absence of jurisdiction was manifest.[24] This view has been restated in a long line of cases.[25] In the *Nuclear Tests* case[26] for example the Court found that:

> 'Whereas on a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case, and yet ought not to indicate such measures unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded.'[27]

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[22] *Ibid.* para. 28.
[23] *ibid.* paras. 18 and 20
[24] *UK v. Iceland*, and *Germany v. Iceland*, Interim Protection Order, ICJ Reports, 1972, 12 and 30, para. 16
[25] See, for example, Aegean Sea Continental Shelf case (*Greece v. Turkey*) ICJ Reports, 1976, 3 and the Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. U.S.A*), ICJ Reports, 1984, 169
[26] *Australia v. France*, Interim Protection Order, 1973, ICJ Reports, 99
[27] *Ibid.*, para. 13

On account of this established practice, the Court's reaction to the United States arguments relating to its jurisdiction, especially the second strand, was fairly predictable. The prima facie standard was reiterated by the Court in *Breard* decision,[28] adding that 'the existence of the relief sought by Paraguay under the Convention can only be determined at the stage of the merits; and … the issue of whether any such remedy is dependent upon evidence of prejudice to the accused in his trial and sentence can equally only be decided upon at the merits.'[29] The Court was similarly unpersuaded by the suggestion that there was no dispute between the parties. In the opinion of the Court, 'there exists a dispute as to whether the relief sought by Paraguay is a remedy available under the Vienna Convention, in particular in relation to Articles 5 and 36 thereof.'[30] As there was a dispute relating to the consequences of breach of the Vienna Convention, the Court had little difficulty in founding jurisdiction under Article 1 of the Optional Protocol Concerning the Compulsory Settlement of disputes.[31]

B. Equality of Arms

The United States argued further that provisional measures must take account of the rights of both parties in order to maintain a fair balance. This would not be the situation if the Paraguayan request were granted.[32] The principle of equality of arms is an inherent part of the right to a fair hearing in any litigation,[33] including incidental proceedings before the ICJ. The Court therefore has to be mindful of the impact of its provisional orders on the equality of arms principle. It is indeed arguable that by seeking to preserve the rights of litigants, provisional measures aim to ensure the equality of arms in litigation before the Court. It follows that not all claims to preserve rights will necessarily conform to the need to maintain equality of arms. The nature and context of Court's interpretation of its powers to indicate provisional measures ensures that parties maintain a balance in their standing. In the first place the rights in need of preservation must refer to rights which are the subject of dispute in the judicial proceedings and, perhaps more importantly, that they are at risk of irreparable prejudice.[34] In addition, provisional measures are justified only if there is urgency[35] about the threat to the potential prejudice to the rights in question. In the *Breard* case, and by extension of the argument, the *LaGrand* case, the scheduled execution of the accused would render it impossible for the Court to order the relief sought by Paraguay or Germany. It was the uncontestable urgency in the *Breard* and *LaGrand* cases which led Judges Schwebel and Oda to vote with the rest of the Court despite their strong reservations about the final decisions.

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[28] *Bread* case, *supra*, note 15 at para. 23 where the Court concluded that:
'on a request for the indication of provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, but … it may not indicate them unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded.'

[29] *Ibid.*, para. 33

[30] *Ibid.*, para. 31

[31] *Ibid.*, paras. 31 and 34

[32] *Ibid.*, para. 21

[33] See Article 6 of the European Convention on Human Rights (Rome 1950). For a review of the place of the principle of equality of arms under the Convention, see, Harris *et al*, *Law of the European*

The question of equality of arms was also at the centre of the decision of the Court to order provisional measures without hearing argument from the parties in the *LaGrand* case. Although the Court claimed to have granted the order *proprio motu*, it did so at the instigation of the Applicant in the case. Not to have heard the Respondent's view in the case raises obvious issues of equality of arms in the litigation. This was an issue which caused Judge Schwebel sufficient concern for him

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Convention on Human Rights (Butterworths 1995) 207 *et seq*. See also, Gomien *et al*, *Law and Practice of the ECHR and the European Social Charter* (council of Europe 1996) 172 *et seq*.

[34] In the *Aegean Sea Continental Shelf* case, *supra*, note 25, the Court rejected the Greek application for provisional measures because the Court reasoned that the harm alleged in the Greek application was one that may be capable of reparation by appropriate means.

to question if the Court's approach was 'consistent with the fundamental rules of the procedural equality of the parties.'[36] Schwebel argued fairly strongly on the distinction between Article 74 of the Court's Rules of Procedure[37] which should govern situations in which a party makes an application before the Court on the one hand, and Article 75(1)[38] by which the Court is empowered to indicate provisional measures under its own steam. According to Schwebel,

> 'The Rule (Article 75(1)) assumes that the Court may act on its own motion where a party has not made a request for the indication of provisional measures. But the Court's consideration of the matter in this case has only been provoked by Germany's application and its request for provisional measures. Article 74 of the Rules provides that, when a party makes such a request, the Court shall arrange "a hearing which will afford the parties an opportunity of being represented at it". No such hearings have been held, arranged or contemplated in the current case.'

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[35] See the application by Switzerland in the Interhandel case (*Switzerland v. USA*) ICJ Reports, 1957, 105, was dismissed on account of a lack of urgency

[36] Separate Opinion of President Schwebel in the *LaGrand* case, *supra*, note 15.

[37] The relevant provision in the Rules of Procedure is Article 74(3) which provides that:
'3. The Court, or the President if the Court is not sitting, shall fix a date for a hearing which will afford the parties an opportunity of being represented at it. The Court shall receive and take into account any observations that may be presented to it before the closure of the oral proceedings.

[38] See, *supra*, note 18

Despite his reservations he nevertheless voted for the order and hoped that the Court's action will not form a precedent. In the circumstances, his decision to support the order rather than vote against it, is correct. The distinction sought to be drawn between Articles 74 and 75 of the Rules of Procedures is, on reflection, not a particularly secure one and may only be justified by reading Article 75(1) in isolation and thus out of context. The Court has power to indicate provisional measures *proprio motu* even when a party has made an application and this is confirmed in Article 75(2) which provides that:

> '2. When a request for provisional measures has been made, the Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request.'

Schwebel's concern for equality of arms is however totally valid because it does not appear on reading the Rules of the Court that a hearing should be dispensed with without overwhelming and compelling reasons.

Confronted with the imminent execution of Mr LaGrand, the Court chose to follow what seemed to it to be the most effective way of securing the life of Mr LaGrand and the rights of Germany. This decision was influenced largely by the extreme urgency of the matter, contributed to by the absence of credible evidence that the United States authorities would show goodwill by staying the execution while the matter was argued before the Court. The distrust of the United States authorities seemed to be confirmed by the fact that despite the indication of provisional orders requesting the United States 'to take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings', the execution nevertheless went ahead as scheduled. Mr Breard was similarly executed inspite of a similarly worded order from the Court. The decision by the United States authorities after both the *Bread* and *LaGrand* cases to execute the accused in the face of the Court's orders rekindles the debate as to whether provisional measures are legally binding, and if so whether the US authorities had complied with the Court's order. An interesting matter discussed in the next section.

C. Public Policy

Finally, the United States made what is, in essence, a general public policy argument to the effect that provisional measures in circumstances of the present case would be contrary to the interests of States Parties to the Vienna Convention on Consular Relations and the international community as a whole. According to the United States, the order sought by Paraguay would disrupt criminal justice systems, given the risk of proliferation of cases.[39] This is not an argument to which the Court addressed directly but perhaps there was little need to do so. If States Parties such as Paraguay and Germany agreed with the United States argument, they would not seek provisional measures from the Court. The present litigation is an indication either that they would not consider that such measures would disrupt their criminal justice systems, or, that any such disruptions, would, in the circumstances, be legitimate. The Court was however keen to point out that the issues in this case do not concern the entitlement of the United States to resort to the death penalty for serious crimes, and also that it is not its function to act as an international court of criminal appeal.[40]

The decisions to indicate provisional measures in the context of the *Breard* and *LaGrand* cases have brought the Court into the direct frame of individual rights protection. In the evolutionary development of its powers this is not surprising as in the past, it has not shunned human rights concerns.[41] The protection of individual rights was at the heart of the Court's provisional orders in both the *Iranian Hostages*[42] and the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*[43] cases. The difference between the present cases and the previous ones is the Court's focus on the rights of the individual. This development was noticeable enough to lead Judge Oda in his separate opinion to caution against its recurrence. According to Judge Oda:

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[39] *Bread* case, *supra*, note 15, para. 22

[40] *Ibid.*, para. 38.

> 'If the Court intervenes *directly* in the fate of an individual, this would mean some departure from the function of the principal judicial organ of the United Nations, which is essentially a tribunal set up to settle inter-state disputes concerning the rights and duties of States. I fervently hope that this case will not set a precedent in the history of the Court.'[44]

Judge Oda is clearly swimming against the tide because the *LaGrand* and *Breard* cases are a predictable, and in the circumstances, justifiable development from the *Hostages* case and the *Bosnia Genocide* case. In addition, on occasions, such as in the present cases where the rights of States and those of individuals are inseparable, it would be unwise for the Court to remain inflexible by seeking to address only the rights of States. This would prove unworkable in practice. International human rights law is understandably a pervasive phenomenon. It provides the essential link in international law between the State and the individual, the ultimate bottom line in any legal order. The effective protection of individual rights before the ICJ cannot be based on the traditional principles of diplomatic protection alone. Diplomatic protection has to take account of the developments in international human rights law.

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[41] For a discussion of this issue, see, Higgins, 'Interim Measures for the protection of Human Rights', in Charney *et al*, (eds.), *Politics, Values and Functions. International Law in the 21st Century. Essays in Honor of Professor Louis Henkin* (Martinus Nijhoff) 87.

[42] *U.S Diplomatic and Consular Staff in Tehran* case *supra*, note 1

[43] *Bosnia & Herzgovina v. Yugoslavia &Montenegro*, ICJ Reports, 1993, 3 and 325

[44] Separate opnion of Judge Oda in the *LaGrand* case, *supra*, note 15

There is also the policy question of the credibility of interim measures, an issue that has brought into sharp focus by the events surrounding this case. The artificial separation between incidental proceedings and the merits stages has often led the Court to postpone the consideration of perfectly valid substantive arguments until the later stage. Respondents in litigation for provisional measures, such as the United States in the cases under discussion, often consider interim measures emerging from incidental proceedings as not sufficiently in conformity with due process rules. This may well account for the abysmal record of compliance with such measures.[45] In the ten cases in which provisional measures were ordered[46] it is only in two of them[47] that one may confidently say that they have been complied with fully. The others (including the two involving the Vienna Convention on Consular Relations)[48] have had either an indifferent or a less compliant response. This profile of State practice creates an unacceptable credibility gap that needs to be bridged. Considering the urgency of provisional measures in order to avoid irreparable prejudice to the rights of litigants, perhaps the best way forward in this regard would be to speed up proceedings in which provisional measures have been ordered. The gap that currently exists between incidental proceedings and the merits stage is sufficiently excessive to generate a sense of injustice in the minds of some litigants.

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[45] On this point see, Shigeru Oda, 'Provisional Measures. The Practice of the International Court of Justice', in Lowe and Fitzmaurice, *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings* (Grotius) 1996) 541

[46] The ten cases are:
(a). Anglo-Iranian Oil Case (*UK v. Iran*) ICJ Reports, 1951, 89; (b). *Fisheries Jurisdiction* Cases, *supra*, note 24; (c). *Nuclear Tests* Cases, *supra*, note 26; (d). *U.S. Diplomatic and Consular Staff in Tehran* Case, *supra*, note 1; (e). Frontier Dispute (*Burkina Faso v. Mali*) ICJ Reports, 1986, 3; (f). *Military and Paramilitary Activities in and Against Nicaragua* case, *supra*, note 25; (g). *Bosnia Genocide* case, *supra*, note 43; (h). Land and Maritime Boundary Between Cameroon and Nigeria (*Cameroon v. Nigeria*) ICJ Reports, 1996, 13; (i). *Breard* case, *supra*, note 15 and (j). *LaGrand* case, *supra*, note 15.

[47] *Frontier Dispute* case, *ibid.*, and *Land and Maritime Boundary Between Cameroon and Nigeria* case, *ibid.*

[48] On this point see analysis *infra* below.

4. The Response to the ICJ Orders within the United States

In response to the Court's provisional measures order in the *Breard* case, the United States Secretary of State, Madeleine Albright wrote to the Governor of Virginia requesting that he exercise his powers as Governor to stay the execution of Mr Breard.[49] She added, however, that 'it is only with great reluctance that I make this request, especially given the aggravated character of the crime for which Mr Breard has been convicted and sentenced and our view of the merits of the Paraguay's legal claims. As Secretary of State, however, I have a responsibility to bear in mind the safety of Americans overseas.'[50] A habeas corpus application and a petition for certiorari before the United States Supreme Court for the release of Mr Breard was denied the day after the ICJ's provisional measures order. The Supreme Court concluded that Mr Breard had 'procedurally defaulted his claim, if any, under the Vienna Convention [on Consular Relations] by failing to raise that claim in the state courts.'[51] The Supreme Court was similarly unconvinced about the material consequences on the case of the failure to comply with the terms of the Vienna Convention. According to the majority opinion:

> 'Even were Breard's Vienna Convention claim properly raised and proven, it is extremely doubtful that the violation should result in the overturning of the final judgment of conviction without some showing that the violation had an effect on the trial. … Breard decided not to

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[49] Letter of Madeleine K. Albright, U.S. Secretary of State, to James Gilmore III, Governor of Virginia, (April 13 1998).
[50] *Ibid.*
[51] *Breard v. Greene*, 118 S.Ct. 1352, 1354 (1998).

> plead guilty and to testify at his own trial contrary to the advice of his attorneys, who were likely far better able to explain the United States legal system to him than any consular official would have been.'[52]

Of central importance to the present discussion is the fact that the State Department and the Department of Justice filed an amicus curiae brief before the Supreme Court urging the court to decline the habeas corpus and certiorari petitions. The amicus brief drew the attention of the court to the ICJ provisional measures but argued at length that despite the lack of consensus on the matter they should be seen as not binding. Both Breard and LaGrand were executed on schedule.

Was the United States legally bound to comply with the orders of the Court to 'take all measures to ensure that [the accused][53] [are] not executed pending the final decision in these proceedings'?[54] What are the legal consequences of the United States reaction in response to the order? These are two of the interesting questions posed by the preliminary litigation before the International Court of Justice relating to the Vienna Convention on Consular Relations.

A. Binding or Bound to be Ineffective?

The legal effect of orders indicating provisional measures is a subject upon which the Court has not had an opportunity to make a definitive pronouncement although that is one area about which there is vast but differing academic opinion.[55] It is generally argued that the reference in Article 41 of the Court's Statute defining the ICJ's 'power to *indicate*, if it considers the circumstances so require, any provisional measures which *ought to be taken* to preserve the respective rights of either party'[56] is a strong pointer to the non-binding nature of these measures. In her amicus brief to the Supreme Court, the United States argued that: 'the use of precatory language ("indicate," "ought to be taken," "suggested") instead of stronger language (e.g.: the ICJ may "order" provisional measures that "shall" be taken) strongly supports a conclusion that the ICJ provisional measures are not binding.'[57] On reflection, the arguments based on the language of Article 41 of the Statute of the ICJ are rather unconvincing and on deep consideration show a serious misinterpretation of that provision. In the first place, the argument fails to address the simple but crucial question of why a treaty obligation is presented as not binding.[58] Furthermore, in the context of the preliminary litigation when provisional measures are often ordered, the ICJ would not have had an opportunity to be fully appraised of all the circumstances of the case including the most appropriate and precise measures necessary for securing litigants rights. The language of Article 41 of the Statute anticipated this and was therefore drafted to enable the Court to secure the rights of litigants by making broad directions, leaving States with sufficient discretion to select the most appropriate, in terms of effectiveness, means of achieving the aims of the order. Such co-operation between an international tribunal and national government, that is based on good faith and the self-interest, underlies the effectiveness in international law. The power to 'indicate provisional measures' … 'which ought to be taken' reflects the ability of the Court to make 'indications' which are expected to be carried out in the relevant domestic environment by the litigating States.

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[52] *Ibid.*, p.1355.

[53] Angel Francisco Breard in the Paraguay application and Walter LaGrand in the application submitted by Germany.

[54]). *Breard* case, *supra*, note 15 para. 41 and *LaGrand* case, *supra*, note 15, para. 29

[55] See for discussions on this subject, Elkind, *Interim Protection: A Functional Approach*, (Nijhoff) 1983; Collins, 'Provisional and Protective Measures in International Litigation', 234 (1992-III) *Recueil*

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des Cours, 9 and Bernhardt (ed.), *Interim Measures indicated by International Courts*, (Springer-Verlag) 1994. See also, Oda, 'Provisional Measures' *supra*, note 45.

[56] ICJ Statute, June 1945 (emphasis added).

[57] See on this point the amicus brief of the United States to the Supreme Court

A proper interpretation of Article 41 of the Statute, taking account of its context and object and purpose,[59] does not lend sufficient support to the view that provisional measures are not legally binding. As an obligation arising from a treaty, the suggestion that an order made by the ICJ, even at the preliminary litigation stage, is not binding is bizarre in the extreme, especially when Article 41 of the Statute of the ICJ is read in conjuction with Article 94(1) of the Charter of the United Nations.[60] That ICJ provisional measures are legally binding, in terms of requiring States to comply with them is not in doubt. To reason otherwise is to deny the provision of the Statute of effect and this could not have been the intention of the drafters of such an important treaty.

Admittedly, the language of Article 41 of the Statute of the ICJ may be imprecise, but that alone is not sufficient reason to conclude that the provision is not binding, especially if its effectiveness can be justified by applying the well-known treaty law principle of *ut res magis valeat quam pereat*. This principle, often referred to as the principle of effectiveness,[61] is acknowledged to be inherent in Article 31 of

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[58] See Article 26 of the Vienna Convention on the Law of Treaties (Done 22 may 1969) which provides that: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

[59] As recommended by Article 31(1) of the Vienna Convention on the Law of Treaties (1969).

[60] Article 94(1) of the United Nations Charter (1945) provides that: 'Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.'
See also the effect of Article 26 of the Vienna Convention on the Law of Treaties, *supra*, note 58. It is particularly important to distinguish between provisional measures issued by the ICJ under the authority of a treaty and those which are issued under facilitative Rules of Procedure such as under the Rules of Procedure of the European Court of Human Rights or those of the United nations Human Rights Committee. The acknowledged non-binding nature of the orders made under Rules of Procedure (on this, see, van Boven, 'Facing Urgent Human Rights Cases; Legal and Diplomatic Action', in Lawson and de Blois (eds.), *The Dynamics of the Protection of Human Rights in Europe. Essays in Honour of Henry G. Schermers Vol. III* (Nijhoff 1994) 61), does not apply to the ICJ orders which are treaty-based.

[61] For a discussion of the scope of this principle, see, McNair, *Law of Treaties* (Clarendon 1961) 383-385. See also, Elias, *The Modern Law of Treaties*, (Oceana 1974), 73-75 and McDougal *et al*, *The Interpretation of Agreements and World Publis Order*, (Yale University Press 1967), 156 *et seq*. See also, Fitzmaurice, 'The Law and Practice of the ICJ: Treaty Interpretation and Certain Other Treaty Points', 28 (1951) *BYIL*, 18.

the Vienna Convention on the Law of Treaties[62] and has been invoked, often approvingly, in litigation before the ICJ.[63] In general, it postulates that treaty provisions should, where possible, be interpreted so as to make the treaty effective rather than to deprive it of it. In practice, the principle is particularly useful in the interpretation of treaties whose purposes are clear, so that when a tribunal is confronted with competing interpretations of that treaty, it can favour the interpretation which conforms closest to the purposes of the treaty in question. In so far as Article 41 of the Statute of the Court is intended to preserve the rights of litigants before the Court pending its final decision and also to ensure that irreparable damage is not caused to these rights, it is important that this provision is interpreted to have more compelling force. In other words, an interpretation that enables litigants to ignore orders made under Article 41 would surely deprive the provision of its effectiveness and hence unacceptable. A similar approach to interpretation was taken by the Court in its Advisory Opinion in the *Reparations* case.[64] To the question whether the United Nations has the capacity to bring an international claim on behalf of its agents, the Court concluded that as 'the organisation was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. … it could not carry out the intentions of its founders if it was devoid of international personality.'[65] Accordingly, the Court concluded that the United Nations is an international person.

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[62] *supra*, note 58. Article 31 of this Convention provides *inter alia* that: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose.'
During the discussion of the draft of this Convention, the International Law Commission took the view that 'in so far as the maxim *ut res magis valeat quam pereat* reflects a true general rule of interpretation, it is embodied in [draft] article 27, paragraph 1, [i.e. article 31(1) of the final text] which requires that a treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to its terms in the context of the treaty *and in the light of its object and purpose*. When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.'. See, *YBILC*, (1966), II, 219.

[63] See for example, the Corfu Channel case (*UK v. Albania*) ICJ Reports, 1949, 4, at 24; the Ambatielos case (*Greece v. UK*) ICJ Reports, 1952, 24 at 45; the Advisory Opinion in the *Reparations for Injuries Suffered in the Service of the United Nations*, (1949) ICJ Reports, 1949, 174, at 179 and the Advisory Opinion in the *Certain Expenses of the United Nations* case, ICJ Reports, 1962, 151, at 162 *et seq.*

[64] *Reparations* case, *Ibid.*

However, the Court has regularly reiterated the view that where the purpose of the treaty is unclear or non-existent, it is not the role of the tribunal to divine such a purpose under the pretext of seeking to make the treaty effective. To the question posed in the request for an Advisory Opinion in the *Interpretation of Peace Treaties* case[66] as to whether in the event of the parties' failure to nominate a representative to the tribunal envisaged by the treaty, the Secretary-General of the United Nations could nevertheless nominate the 'third member' of the tribunal the Court answered in the negative reasoning *inter alia* that:

> 'The principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat,* often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of dispute in the Peace treaties a meaning which … would be contrary to the letter and spirit.'[67]

This caveat is inapplicable in the present interpretation of Article 41 of the Statute of the Court.

It is possible to argue that Article 41 of the ICJ Statute has lost some or all of its binding character as a consequence of continuing disregard with which most respondent States have treated the provisional orders directed at them.[68] However, the State practice on the matter is an indication of the ineffectiveness of provisional measures in practice rather than of their non-binding nature in law.

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[65] *Ibid.,*

[66] (Second Phase) ICJ Reports, 1950, 221.

[67] *Ibid.,* 229

The true legal character of provisional measures may lie somewhere between the two extreme academic characterisations. On a purposive interpretation of Article 41, it is clear that provisional measures are expected to secure vulnerable rights of the parties and will be ordered only after the most rigorous examination of key questions relating to the jurisdiction of the Court, the urgency of the matter and the possibility of irreparable harm.[69] The rigour and care with which the Court reviews requests for provisional measures is an indication of their legal importance and orders emanating from such a context deserve higher legal value than that of a mere recommendation. In fact, there should be little dispute about their binding character. From an objective point of view, it is difficult to contest this as a matter of principle, in which case the focus of the debate should be on the practical consequences of the individual Court order. For example, a broadly drafted Court order may give contesting States wider discretion as to the manner of compliance. In such an event, less comprehensive measures short of total disobedience to the Court order can be considered to be legitimate within the scope of the letter of the order if not always in the spirit of it. Conversely, an order with more precise indications provides relatively limited scope for States' manoeuvre in their compliance of the order. Unlike the broadly drafted provisional orders, it is much easier in cases of narrowly drafted orders to tell the extent of non-compliance. The broad manner of the orders in the *Breard* and *LaGrand* cases 'to take all measures to ensure that [the accused are] not executed, contrast sharply with, for example, the Court's order in the *Iranian Hostages* case for

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[68] On this point see, Oda, 'Provisional Measures', *supra*, note 45. See also notes 46-48 *supra*, and accompanying texts.

[69] *Nuclear Tests* Cases, *supra*, note 26, 103 *U.S. Diplomatic and Consular Staff in Tehran* Case, *supra*, note 1, para. 36 and, *Bosnia Genocide* case, *supra*, note 43, para. 34.

Iran to immediately ensure the restoration of the premises of the US Embassy to the possession of the US authorities as well as the immediate release of the hostages.[70]

In the cases relating to the Vienna Convention on Consular Relations,[71] the United States was extremely careful not to suggest that all provisional measures were not binding but rather limited her views and practical response to the specific terms of the Court's orders. Although in their amicus curiae opinion to the US Supreme Court, the State Department and Department of Justice expressed a preference for the academic opinion holding ICJ provisional measures not to be binding, this was in a wider context acknowledging a clear lack of academic consensus on the matter.[72] Not only is this preference for a particular line of academic argument inconclusive of the issue of legal effect of provisional measures, but also, it is a position which reserves room for persuasion to an alternative view at a later stage of the academic discourse. Therefore, the most significant contribution of the amicus curiae opinion is the conclusion that the provisional measures directed at the United States are rather broad, leaving the United States to take whatever measures it considers appropriate in the circumstances. According to the amicus brief,

> 'the "measures at [the Government's] disposal" are a matter of domestic United States law, … The "measures at [the United States'] disposal" under our constitution may in some cases include persuasion – such as the Secretary of State's request to the Governor of Virginia to stay Breard's execution – and not legal compulsion through the judicial system.'

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[70] Other precise order were in the *Nuclear Test* cases when France was ordered to avoid (atmospheric) nuclear tests causing the deposit of radioactive fall-out on Australian and New Zealand territories. See also the order in the *Nicaragua* case in which the United States was called upon to cease and refrain from any action blocking access to or from Nicaraguan ports and laying or mines.

[71] *Breard* case, *supra*, note 15 and . *LaGrand* case, *supra*, note 15.

[72] *Bread v. Greene*, 118 S.Ct. 1352 (1998) Brief of the United States as Amicus Curiae.

Similarly, in her letter to the Governor of Virginia, the Secretary of State, Madeleine Albright focused on the 'non-binding language' of the specific order under consideration rather than to suggest that provisional measures were not legally binding as a matter of international law.[73] This phrase 'non-binding language' used by the Secretary of State must not be interpreted to suggest that the order was not legally binding per se but rather a reflection of its broad character, leaving room for the United States to take the necessary action to comply with it. Indeed, the Secretary of State's letter to the Governor of Virginia in response to the ICJ order is itself evidence that she considered the order to be legally binding.

B. Compliant or Disregarding

The issue of whether the provisional orders from the ICJ are binding is directly related to the extent of United States compliance with the orders. In truth, although the United States response to the ICJ orders may be said to be in compliance of the letter of the orders, the limited action by the Secretary of State and the contradictory arguments filed by her office in conjunction with the Department of Justice in the amicus curiae opinion before the Supreme Court unfortunately undermined the spirit of the ICJ orders. There is an overwhelming impression that the United States did not take the ICJ orders seriously and therefore lost an opportunity to indicate good practice for instilling effectiveness into such orders. In the circumstances, the United States betrayed the confidence normally reposed in States to flesh out skeletal orders of international tribunals. It may also be the fact that the ICJ's inability to prescribe more precise indications in such circumstances is a structural shortcoming in international dispute settlement that may need to be remedied.

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[73] Letter of Madeleine K. Albright, U.S. Secretary of State, to James Gilmore III, Governor of Virginia, *supra*, note 49. She wrote that 'The International Court, however, was not prepared to decide the issues we raised in its urgent proceedings last week. Using non-binding language, the Court said that

In the light of the ICJ order directed the United States to 'take all measures at its disposal to ensure that [the accused are] not executed pending the final decision in these proceedings', could or indeed should the United States have done more than it chose to do? Emphasising the need to take 'all measures at its disposal', it is arguable for example that the Secretary of State could have been less diffident and more compelling in her letter to the Governor of Virginia demanding rather than urging the postponement of Mr Breard's execution. A more decisive approach from the Secretary of State and the State Department may have helped focus the minds of other United States institutions in ensuring that the ICJ orders are implemented in full. The State Department need not have joined the Department of Justice in its amicus curiae opinion in which it played down the legal significance of the ICJ order. One would normally have expected nothing less than the contrary arguments in which the attention of the Supreme Court is drawn to the compelling obligations inherent in the ICJ orders or persuaded to show deference for the views of the ICJ as a matter of judicial comity.[74] In fact, the Supreme Court could have taken a more serious account of the legal obligations generated by the ICJ orders or where this is not possible, 'invite the executive branch to invoke judicial assistance by other proceedings.'[75] With its recognised leadership in the field of international affairs, the State Department could have argued the legal significance of ICJ measures arising from United States treaty obligations which by the terms of the Constitution of that country

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the United States should "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings.'

[74] On this point, see, Slaughter, 'Court to Court', 92 (1998) *AJIL*, 708.

[75] See, Henkin, 'Provisional Measures, U.S. Treaty Obligations and the States' 92 (1998) *AJIL*, 679. He cites the cases of *Sanitary Dist. V. United States*, 262 U.S. 405 (1925) and *United States v. Minnesota*, 270 U.S. 181 (1926) to support this claim.

are part of the law of the land.[76] As applicable law of the United States the ICJ orders defined obligations 'for all who exercised authority in or on behalf of, the United States.'[77] In this instance, according to Professor Louis Henkin,

> 'Secretary [of State] Albright heard the voice of the International Court and acted upon it. But the Solicitor General seemed to be under the impression that the order of the Court was not addressed to him (or at least he was not bound by it). The Supreme Court was also perhaps under the impression that the ICJ order was not addressed to it, that it was not bound by it, or that it had no responsibility (and no means) to honor it. The Department of Justice did not take measures to obtain compliance by the State of Virginia with the treaty obligation of the United States to stay the execution. Governor Gilmore seemed to be under the impression that the International Court of Justice was not addressing him; perhaps he did not think he was required to honor Secretary Albright's request.'[78]

The United States response to the ICJ orders was haphazard and often contradictory. The relevant institutions did not work together towards a single purpose and to all intents and purposes clearly failed to implement the orders effectively. This is particularly unfortunate in view of the fact that a genuine lack of co-operation by other official institutions and departments could have been overcome by an executive order from the President compelling compliance with United States treaty obligations.[79]

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[76] See Article VI of United States Constitution. On this point see, Henkin, 'Provisional Measures', *Ibid.*, and Vazquez, '*Breard* and the Federal Power to require Compliance with ICJ Orders of Provisional Measures', 92 (1998) *AJIL*, 683.

[77] Henkin, 'Provisional Measures', *ibid*, at 680.

[78] *Ibid.*

[79] Vazquez, '*Breard* and the Federal Power to require Compliance', *supra*, note 76, at 685.

In the United States, effective implementation of ICJ orders depends on the leadership provided by the federal government and especially the State Department. Where this leadership is weak and uncertain the process of implementation fails too.[80] The Secretary of State took *a* measure as required by the ICJ order by writing to the Governor of Virginia but the terms of the letter lacked commitment. She found no further reason to explore alternative measures and in fact, did not object to the endorsement given by her officials to a damaging amicus brief prepared by the Department of Justice. The irresolute approach taken by the Secretary of State and her officials was extremely influential in the reaction of other United States institutions and officials. Judges of the Supreme Court, no doubt as independent as they are known to be, could not have lost sight of the significance of the official State Department position in this matter in their conclusions. In the same vein, the Governors of the Virginia and Arizona where Mr Breard and LaGrand faced the death penalty respectively were strengthened in their determination not to exercise clemency.

The United States set a particularly bad precedent for the future of international rule of law. The United States treatment of the provisional orders reflects a failure of leadership on its part. If other States are encouraged to follow the United States example by being selective and sceptical about ICJ orders, the authority of the Court will surely be undermined. The ICJ may well have to reconsider the confidence and good faith it has reposed in States to treat its orders with respect. This lack of trust may have partly contributed to the unprecedented step taken by the Court to order provisional measures in the *LaGrand* case without argument from the parties. The Court may also decide to restrict State discretion in the implementation of provisional measures by being a lot more specific and precise in its future orders. Such a development would be unfortunate because the Court risks greater conflict with litigating States in the hope of asserting its authority.

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[80] Weak leadership is, of course, no excuse for non-compliance with international obligations.

A crucial factor in looking at the specific content of ICJ provisional measures for guidance to as to how best to implement them diligently is to pay attention to all relevant qualitative issues. Unfortunately, the United States in its effort to avoid disruption to its domestic legal process failed to realise that despite the broad presentation of the ICJ orders there was a matter of the human right to life at the heart of all the formality of diplomatic discourse and the rigidity of legal argument. By failing to attach importance to this distinguishing characteristic of the cases, the United States ignored not only the stark reality of the irreparability of lost life but also the importance of the right to life in international human rights law.[81] It has been argued that restrictions on and abolition of the death penalty is fast approaching a norm of customary international law,[82] and this fact should have been weighted heavier in favour of adopting further and more effective measures to implement the ICJ orders. In the same vein, the lack of consular access in both the *Breard* and

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[81] Apart from the provisions in international treaties recognising the right to life (see, Article 6 of the International Covenant on Civil and Political Rights (1966); article 4 of the American Convention on Human Rights (1969); article 4 of the African Charter on Human and Peoples' Rights (1981); article 2 of the European Convention on Human Rights (1950), there is an increasing effort to abolish the death penalty (see Protocol No. 6 of the ECHR (1983); the Second Optional protocol to the ICCPR (1989) and the Protocol to the American Convention on Human Rights to Abolish the Death penalty (1990). In practice, it is estimated that by December 1998, 63 States had abolished the death penalty for all crimes, 16 States had done so for all but the most exceptional crimes such as war crimes and another 24 States have been abolitionists *de facto* as they have not carried out any executions for at least 10 years. On this point see, Prokosch, *Human Rights v. Death Penalty. Abolition and Restriction in Law and Practice*, (Amnesty International) 1998. In addition, is noteworthy that the European Court of Human Rights and the Inter-American Court of Human Rights have ruled that certain aspects of the death penalty to be inhuman and degrading (see *Soering v. United Kingdom*, ECHR (1989), Series A, No. 161 and Inter-American Court of Human Rights, Advisory Opinion OC-3/83 of 8 September 1983 on *Restrictions to the Death penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights*. See also Case 9647, *Roach and Pinkerton* in *Annual Report of the Inter-American Commission on Human Rights 1986-1987*, 147.

[82] See Schabas, *The Abolition of the Death penalty in International law* (Grotius 1997), 20.

LaGrand cases which arguably created an unfairness in the criminal procedures[83] should have tilted the scales in favour of the restraint suggested by the ICJ in its provisional measures. The true impact of these human rights issues will become clear at the merits stage but nevertheless their significance at the preliminary stage should have been recognised.[84]

The complementarity between international and national institutions in upholding the international rule of law is well known. In practice, the implementation of measures such as orders made at the preliminary stage of international litigation can involve complex processes of balancing competing claims and interests at both national and international levels.[85] However, it is crucial that the whole process is seen to be transparent, as objective as possible and in any case, effective in upholding the international obligations assumed in good faith. Domestic law and procedures may be taken into account in defining the most effective way of upholding international obligations in practice, but it is trite knowledge that domestic law cannot be an excuse for the non-compliance with international law.[86] In the same context, unjustified preferences for some factors over others or a dependence upon irrelevant considerations may damage the credibility of the process and its conclusions. In the context of how to implement the ICJ measures effectively the United States unfortunately attached greater importance to domestic factors to the detriment of international rule of law. For example, at the stage of the preliminary litigation before the ICJ, the argument that the deceased had had a fair trial or that their cases were unlikely to be prejudiced by the lack of consular access[87] were clearly irrelevant as to whether or not to heed the Court's preliminary orders. In making the preliminary measures orders, the Court was fairly aware of the domestic trials and equally aware of the impact of these and other substantive issues on arguments relating to the merits of the case. The Court's primary concern at that stage of litigation was to secure the rights of the parties by forestalling irreparable harm. Similarly, domestic law arguments relating to procedural default and the so-called exclusive jurisdiction of the United States Supreme Court to postpone the execution or the clemency powers of Governors of states should not have been used to override the value of the Court's orders at the preliminary stage of the litigation.[88]

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[83] The European Court of Human Rights for instance has devoted a considerable attention to the distinction in Article 6 of the ECHR between objective and subjective impartiality. In the present cases, the issue is not one of subjective impartiality but one of objective impartiality under which the question is whether there have been sufficient guarantees to exclude any legitimate doubt in the trial process. On this point see *Hauschildt v Denmark*, ECHR (1989), Series A, No.154.

[84] For a general discussion of this subject see, Higgins, 'Interim Measures for the Protection of Human Rights', *supra*, note 41

[85] See, Bradley and Goldsmith, 'The Abiding Relevance of Federalism to U.S. Foreign Relations', vol. 92 (1998) *AJIL*, 675

[86] See Article 27 of the Vienna Convention on the Law of Treaties which provides that: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty ...' There is also a wealth of respectable case law to support this view. See, for example, the *Alabama Claims* Arbitration (1872), the Wimbledon case (*France, Italy, Japan and the UK v. Germany*) PCIJ Reports, Series A, No. 1 (1923), 29; the Chorzow Factory (Merits) case (*Germany v. Poland*) PCIJ Reports, Series A, No. 17, (1928), 33, 34; the Nottebohm case (*Liechtenstein v. Guatemala*) ICJ Reports, 1955, 4 at 20-21.

5. Conclusions

That the United States was not entirely unequivocal in its suggestion that interim measures are not binding per se is a significant factor in the discourse relating to the legal significance of such measures. On critical reflection of the United States' response to the ICJ orders, there is merit in the inherent argument that a distinction should be drawn between the binding nature of such orders and the steps taken to implement them. This is crucial to our understanding of the subject because States may, depending upon the wording of the individual ICJ order, legitimately take less than comprehensive steps to implement the Court's directions without doubting their binding nature. The discretion which States retain in the implementation of such orders allows them to strike a balance between competing factors at both national and international levels. This is what the United States sought to do in the *Breard* and *LaGrand* cases. Unfortunately, it did so rather poorly by attaching excessive importance to domestic law factors to the detriment of its international obligations. While it is difficult to say that such a misuse of discretion is itself a breach of the terms of the ICJ orders, it most certainly went against the spirit of the orders.

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[87] See *Breard v. Greene*, *supra*, note 51. A careful examination of the facts of the *Breard* case suggests that this assertion is also unjustified. In an earlier litigation in the United States courts (*Breard v. Netherland*, 949 F.Supp. 1255 (1996), it apparently emerged that 'Breard believed he had committed the crime under a satanic curse from his ex-father-in-law. His conversion and rebirth in Jesus Christ, according to Breard, freed him from the curse. Thus Breard believed that if the jury were told of the satanic curse and his rebirth in Jesus Christ, they would understand that he had not been responsible for his actions at the time of the murder and would set him free. Apparently, in South American jurisprudence, the fact one believes he is under a satanic curse is mitigating evidence in the sentencing phase of a trial and a confession to a jury is likely to result in greater leniency.' See, Kadish, 'Article 36 of the Vienna Convention on Consular Relations: A Search for the Right of Consul', 18 (1997) *Mich.JIL*, 565, at 582. Breard had also turned down plea bargaining offer with the Commonwealth of Virginia to be able to make this confession to the jury. Evidently he was not particularly bright but if ever someone could have benefited from the perception of a consular officer on this matter it was Mr Breard. The cultural implications of his decisions were more likely not appreciated by his American lawyers.

[88] See *supra*, note 86 *supra* and accompanying text.

As a country confronted with widespread deficiencies in its domestic application of the Vienna Convention on Consular Relations,[89] the United States' response to the ICJ order should not come as particularly surprising. The fear of floodgate of litigants seeking to set aside convictions for non-compliance with the Vienna Convention on Consular Relations, counter pressure from victims' families and non-governmental organisation may have weighed heavily on the minds of United States policy makers. There are, also, public order concerns (e.g. the need to deter the growing culture of violent crime) and not forgetting the career ambitions of individual policy makers, especially Governors of States where these offences are committed. Perhaps, the importance of international rule of law, especially, in the present context the importance of international human rights law should have been paramount. Be that as it may, as it is unlikely that the Court will review the United

States use of discretion in this matter, it is important to look to the future of the international law issues raised here. There is a definite structural shortcoming in the manner in which provisional measures are currently conceived. Unless these are remedied, their effectiveness will remain a matter of chance. The procedures for consular access may well get the necessary boost. The benefits of any increased awareness about consular access may however remain variable. However, even if only some detainees were to receive the full benefits of consular access as a result of recent events in the United States, then the litigation and the widespread academic comment can be said to have been worthwhile.

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[89] It is estimated that over 70 other foreign nations remain in detention in the United States who have not been made aware of their right to consular access. See, Shank and Quigley, 'Foreigners on Texas's Death Row and the Right of Access to a Consul', 26 (1995) *St Mary's Law Journal*, 719.

Annex MG 59

STATEMENT BY GOVERNOR JIM GILMORE CONCERNING THE EXECUTION OF ANGEL BREARD

(14 APRIL 1998)

COMMONWEALTH OF VIRGINI

OFFICE OF THE GOVERNOR

PRESS OFFICE

Contact: Mark A. Miner
Phone: (804) 692-3110
Pager: (888) 646-5017

FOR IMMEDIATE RELEASE
April 14, 1998

STATEMENT BY GOVERNOR JIM GILMORE CONCERNING THE EXECUTION OF ANGEL BREARD

RICHMOND – Angel Breard, through his attorneys, has petitioned me to grant clemency for his crimes or, alternatively, a reprieve pending the outcome of proceedings commenced by the Republic of Paraguay in the International Court of Justice. The U.S. Secretary of State has also requested that I stay Mr. Breard's execution for an indefinite period. For the following reasons, I must decline to intervene in this matter.

Breard was convicted and sentenced to death for the attempted rape and brutal murder of Ruth Dickie, a 39 year old unmarried woman. Microscopic examination of Breard's hair, together with enzyme and DNA testing of his blood, established Breard's guilt. Additionally, Breard testified in open court, admitting his own guilt. Breard was represented by counsel and received a fair trial. His arguments to overturn his conviction and sentence have been heard and rejected by the Supreme Court of the Commonwealth of Virginia, the U.S. District Court for the Eastern District of Virginia, the U.S. Court of Appeals for the Fourth Circuit, and the U.S. Supreme Court.

It has been stipulated by both the prosecution and Mr. Breard that he was not notified of his ability to contact his consulate as required under the Vienna Convention on Consular Relations. The Republic of Paraguay has brought a proceeding in the International Court of Justice, claiming that that foreign tribunal has jurisdiction to stay his execution, void his conviction, and order a new trial. The International Court of Justice has issued an "indication of provisional measures" to have Mr. Breard's execution delayed while it considers the merits of Paraguay's claims. It is my understanding that the International Court's proceeding could take years to reach conclusion.

-MORE-add I. breard

Both Mr. Breard and the Republic of Paraguay filed cases concerning this matter before the U.S. Supreme Court. At the request of the Court, the U.S. Department of Justice has argued forcefully that the rulings of the International Court of Justice are not enforceable by the courts of the United States, that the International Court of Justice has not authority to intervene in the criminal justice system of the Commonwealth of Virginia or any other state, and that the Supreme Court should not intervene in this matter. At the same time, the Secretary of State has requested that I stay Mr. Breard's execution. The Secretary specifically raises concern "about the possible negative consequences for the many U.S. citizens who live and travel abroad."

The concerns expressed by the Secretary of State are due great respect and I have given them serious consideration. However, it is but one of the various concerns that I must take into consideration in reaching my decision.

As Governor of Virginia my first duty is to ensure that those who reside within our borders -- both American citizens and foreign nationals – may conduct their lives free from the fear of crime. Our criminal justice system is designed to provide the greatest degree of safety for law abiding citizens and foreign visitors alike while ensuring substantial procedural safeguards to those accused of crime. Indeed, in this case Mr. Breard received all of the procedural safeguards that any American citizen would receive.

I am concerned that to delay Mr. Breard's execution so that the International Court of Justice may review this matter would have the practical effect of transferring responsibility from the courts of the Commonwealth and the United States to the International Court. Should the International Court resolve this matter in Paraguay's favor, it would be difficult, having delayed the execution so that the International Court could consider the case, to then carry-out the jury's sentence despite the rulings the International Court.

The U.S. Department of Justice, together with Virginia's Attorney General, make a compelling case that the International Court of Justice has no authority to interfere with our criminal justice system. Indeed, the safety of those residing in the Commonwealth of Virginia is not the responsibility of the International Court of Justice. It is my responsibility and the responsibility of law enforcement and judicial officials throughout the Commonwealth. I cannot cede such responsibility to the International Court of Justice.

Mr. Breard having committed a heinous and depraved murder, his guilt being unquestioned, and the legal issues being resolved against him, and the U.S. Supreme Court having denied the petitions of Breard and Paraguay, I find no reason to interfere with his sentence. Accordingly, I decline to do so.

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Annex MG 60

U.S. DEPARTMENT OF STATE,
FOREIGN AFFAIRS MANUAL 1984
(EXTRACT)

7 FAM 400 ARREST OF U.S. CITIZENS ABROAD

7 FAM 400 (This is under the OLD Numbering Scheme)

7 FAM 401 INTRODUCTION

(TL:CON-11; 10-30-84)

Traditionally, one of the basic functions of a consular officer has been to provide a "cultural bridge" between the host community and the officer's own compatriots traveling or residing abroad. No one needs that cultural bridge more than the individual U.S. citizen who has been arrested in a foreign country or imprisoned in a foreign jail.

Neither arrest nor conviction deprives a U.S. citizen of the right to the consular officer's best efforts in protecting the citizen's legal and human rights. Consular officers are obliged to assist arrested or imprisoned U.S. citizens with dedicated professionalism, regardless of their own views as to the innocence or guilt of the individuals.

Although consular officers are the principal action officers in arrest cases, they may need help from other post officers in making prison visits, in attending trials, and in cultivating rapport with and gaining the cooperation of local law enforcement officials. This is especially true at posts where consular resources are limited and the consular workload is heavy. Such cooperation should be encouraged whenever possible.

The guidelines in this chapter should not be taken as defining the limits of a post's responsibility, but rather as furnishing a frame of reference for each post's own creative approach to arrestee and prisoner services.

7 FAM 402 AUTHORITY

There is limited legislative authority for providing consular assistance to U.S. citizens who are detained, arrested, or imprisoned abroad. Public Law 95-45 of June 15, 1977, effective October 1, 1978, provided for emergency medical and dietary assistance (EMDA) to prisoners abroad on a reimbursable basis (see section 7 FAM 450). The Vienna Consular Convention and many current bilateral consular treaties require that host governments of countries which are signatories to such a convention or treaty notify arrestees promptly of their right to communicate with the U.S. consul and/or notify the consular officer of a foreign state of the arrest of one of its citizens (see sections 7 FAM 411.1 and 7 FAM 411.2).

(TL:CON-11; 10-30-84)

7 FAM 411 NOTIFICATION

In order for the consular officer to perform the protective function in an efficient and timely manner, it is essential that the consul obtain prompt notification whenever a U.S. citizen is arrested. Prompt notification is necessary to assure early access to the arrestee. Early access in turn is essential, among other things, to receive any allegations of abuse, to provide a list of lawyers and a legal system fact sheet to prisoners, to obtain a Privacy Act waiver, and to acquire certain information to enable the post and the Department to respond promptly and accurately to inquiries about the case (see section 7 FAM 412 .)

7 FAM 411.1 Vienna Consular Convention

Article 36 of the Vienna Consular Convention provides that the host government must notify the arrestee without delay of the arrestee's right to communicate with the American consul. Consular officers should be familiar with the Vienna Convention and its provisions on arrest cases. See section 7 FAM 411 Appendix A 411.1 , for an extract from the Vienna Consular Convention and section 7 FAM 411 Appendix A 411.2 , for a current list of signatories to this Convention.

7 FAM 411.2 Bilateral Consular Treaties

Many of our current bilateral consular treaties also require that the arresting authorities directly and promptly notify the consular officer of a foreign state of the arrest of a national of that state. The consular officer must be familiar with the details of bilateral consular treaties between the host government and the United States (see section 7 FAM 411 Appendix A 411.2). The text of applicable bilateral treaties should be inserted into this chapter by consular officers at post for ready reference.

7 FAM 411.3 Relations with Local Authorities

Practical considerations make it imperative that the consular officer be notified immediately by local authorities whenever a U.S. citizen is arrested. For purposes of notification and access, the Department considers a citizen under arrest from the moment the citizen is deprived of liberty by a foreign governmental agency or authority. In order to provide effective protection and assistance to arrested Americans, consular officers are expected to maintain relationships with local authorities and other sources which will secure their cooperation in providing immediate notification, no matter what the language of applicable treaties legally requires. Without such prompt notification of arrest, it is impossible to achieve the essential timely access to a detained U.S. citizen.

7 FAM 412 ACCESS

Experience has demonstrated that prompt personal access to the detained citizen assures both the arrestee and the host authorities of the serious interest of the U.S. Government in the case. Further, it enables the consular officer to provide the arrestee with a list of reputable lawyers or information concerning local legal aid before the arrestee selects a lawyer who may prove to be a charlatan. It provides an opportunity for the consular officer to explain the legal and judicial procedures of the host government and the detainee's rights under that government at a time when such information is most useful. Prompt personal access to the detainee is necessary to forestall physical abuse of the prisoner by the arresting and/or investigating authorities or to ascertain when such abuse has occurred.

If the Department and its posts abroad are to insist that host-country arresting authorities notify an American consular officer without delay following their arrest of a U.S. citizen, it is incumbent upon the consular officer to visit the arrestee as soon as possible following receipt of notification. Otherwise the sincerity and credibility of the U.S. Government about its concern for its arrested citizens' welfare and rights will surely be questioned, and obtaining the cooperation of host country officials on prisoner matters will be more difficult.

Upon receiving notification that a U.S. citizen is being detained, it is absolutely essential that the post achieve timely access to the detainee through one of the following methods.

7 FAM 412.1 Personal Visit

Except under the most extraordinary circumstances, an officer must personally see and visit the arrestee as soon as possible, normally within 48 hours of receipt of notification. Should a personal visit prove impossible and one of the methods described below be employed, the post must explain to the Department the circumstances preventing the personal visit.

7 FAM 412.2 Telephone Contact

If an immediate personal visit by an officer is not possible, efforts must be made to get in touch with the detainee by telephone. Such contact does not eliminate the consular officer's responsibility to follow up with a personal visit at the earliest possible opportunity, normally within a few days.

7 FAM 412.3 Visit by Volunteers

If an immediate personal visit by an officer is not possible, the post may wish to consider enlisting cooperation of U.S. citizens residing in the area of the place of arrest to visit the detained U.S. citizen. Again, this does not eliminate the consular officer's responsibility to follow up with a personal visit as soon as possible, normally within a few days.

7 FAM 412.4 Consular Agents

Pending a visit by a consular officer, a consular agent (if one is available) should visit the arrestee promptly. Posts that have consular agents assigned within their districts should make maximum use of them in protecting the legal and human rights of incarcerated U.S. citizens and assuring their welfare. As a guide to what consular agents may be expected to do in such instances, posts should consult the Consular Agents' Handbook.

7 FAM 413 INITIAL VISITS

In the course of the initial visit to a U.S. citizen arrested or incarcerated abroad, the consular officer must endeavor to give the arrestee a realistic and positive understanding of the U.S. Government's interest in and responsibility for a citizen in this situation. While it is only fair to curb the prisoner's expectations of extraordinary intervention or miraculous remedies, the consular officer must emphasize the actions that can be taken on the arrestee's behalf. A U.S. citizen is entitled to claim consular protection abroad, regardless of evidence of guilt, the nature of the alleged crime, or the personal merit of the citizen. Thus, the consular officer must avoid any display of disdain, self-righteousness, or moral disapproval which might impair the relationship with the arrestee. The officer should accomplish several objectives during or as a result of the initial visit.

7 FAM 413.1 Verification of Citizenship and Identity

Before rendering any substantial service to an arrestee, the consular officer must ascertain that the individual is entitled to the protection of the U.S. Government by being one of the following:

a. A U.S. citizen. In the majority of cases, possession of a passport satisfactorily establishes both the identity and the citizenship of the individual. In countries where citizens customarily travel without passports, however, or where the individual claims a passport has been lost or stolen, the consular officer will have to rely upon secondary documentary evidence or judgment based upon the results of conversation with the prisoner (see chapter 7 FAM 1100 , entitled "Acquisition and Retention of U.S. Citizenship," and chapter 7 FAM 1200 , on Loss and Restoration of U.S. Citizenship, for further clarification).

Annex MG 61

LETTER OF U.S. SECRETARY OF STATE ALBRIGHT TO THE CHAIRMAN OF THE TEXAS BOARD OF PARDONS AND PAROLES

(27 NOVEMBER 1998)

THE SECRETARY OF STATE
WASHINGTON

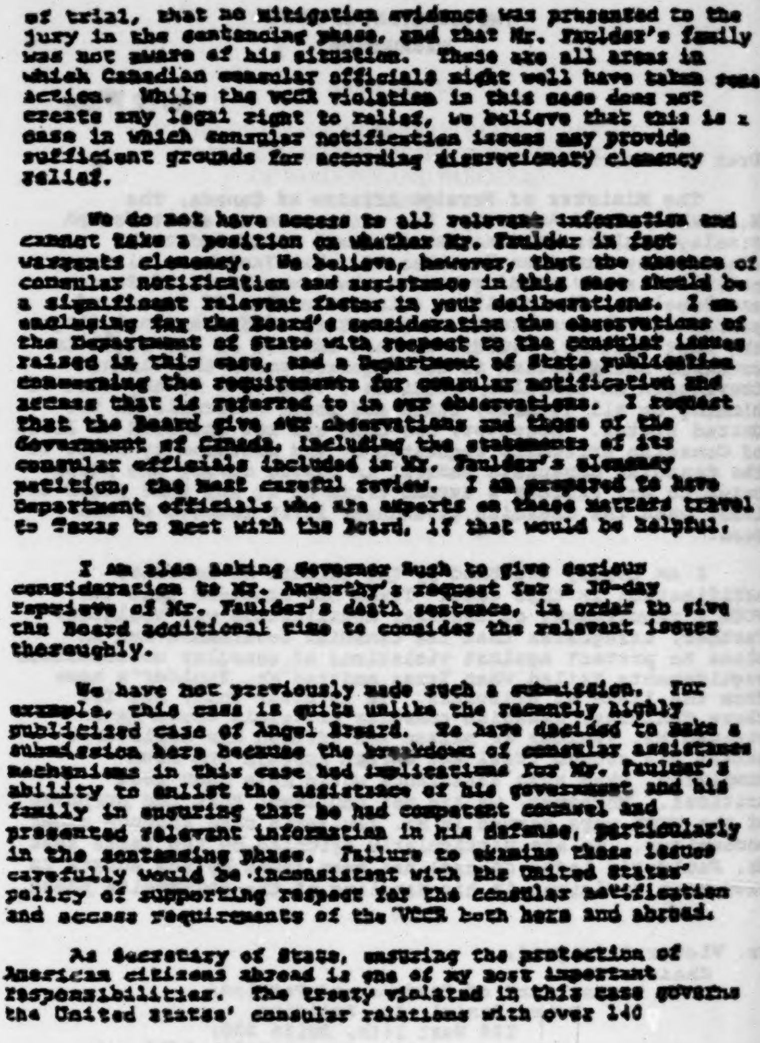
NOV 27 1998

Dear Mr. Rodriguez:

The Minister of Foreign Affairs of Canada, The Honorable Lloyd Axworthy, has written to me about Joseph Stanley Faulder, a Canadian national scheduled to be executed by Texas on December 10. Mr. Faulder's clemency petition is now pending before the Texas Board of Pardons and Paroles. The petition raises a number of issues of particular concern to me as Secretary of State, including the fact that Mr. Faulder was not advised of his right to consular notification as was required under the Vienna Convention on Consular Relations ("VCCR"), a treaty that is binding on all federal, state and local officials in the United States. Moreover, his name was not included on lists of Canadian prisoners requested by and provided by Texas to the Canadian Consulate General in Dallas during the period prior to Mr. Faulder's second trial or at any time prior to 1992, when the Canadian government first learned of his case.

I am deeply troubled by the failure of consular notification in this case. Texas has conceded that the VCCR's requirement of consular notification was violated. Further, safeguards that the Canadian Government had in place to protect against violations of consular notification requirements failed when Texas omitted Mr. Faulder's name from the lists of prisoners. It is clear that, but for these failures, Canadian consular officials would have visited Mr. Faulder in prison and offered him assistance before his second trial and direct appeals had been completed, when such assistance would have been most critical. Moreover, we are not confident that the purposes of the VCCR were served in Mr. Faulder's case through other mechanisms. We are particularly troubled by the facts that Mr. Faulder's legal counsel has been found by the courts to have been deficient in his handling of the sentencing phase

Mr. Victor Rodriguez,
Chairman,
Texas Board of Pardons and Paroles,
Price Daniel, Sr. Building,
209 West 14th, Suite 500,
Austin, Texas 78701-1614.



of trial, that no mitigation evidence was presented to the jury in the sentencing phase, and that Mr. Faulder's family was not aware of his situation. These are all areas in which Canadian consular officials might well have taken some action. While the VCCR violation in this case does not create any legal right to relief, we believe that this is a case in which consular notification issues may provide sufficient grounds for according discretionary clemency relief.

We do not have access to all relevant information and cannot take a position on whether Mr. Faulder in fact warrants clemency. We believe, however, that the absence of consular notification and assistance in this case should be a significant relevant factor in your deliberations. I am enclosing for the Board's consideration the observations of the Department of State with respect to the consular issues raised in this case, and a Department of State publication concerning the requirements for consular notification and access that is referred to in our observations. I request that the Board give our observations and those of the Government of Canada, including the statements of its consular officials included in Mr. Faulder's clemency petition, the most careful review. I am prepared to have Department officials who are experts on these matters travel to Texas to meet with the Board, if that would be helpful.

I am also asking Governor Bush to give serious consideration to Mr. Axworthy's request for a 30-day reprieve of Mr. Faulder's death sentence, in order to give the Board additional time to consider the relevant issues thoroughly.

We have not previously made such a submission. For example, this case is quite unlike the recently highly publicized case of Angel Breard. We have decided to make a submission here because the breakdown of consular assistance mechanisms in this case had implications for Mr. Faulder's ability to enlist the assistance of his government and his family in ensuring that he had competent counsel and presented relevant information in his defense, particularly in the sentencing phase. Failure to examine these issues carefully would be inconsistent with the United States' policy of supporting respect for the consular notification and access requirements of the VCCR both here and abroad.

As Secretary of State, ensuring the protection of American citizens abroad is one of my most important responsibilities. The treaty violated in this case governs the United States' consular relations with over 140 countries and provides the basic framework under which United States consular officers under my direction assist American citizens imprisoned abroad. Last year, the Department of State was providing assistance to over 2,500 such Americans, including well over 300 from Texas. We assist by attempting to ensure that they understand the foreign country's legal system and their legal options, by helping them obtain qualified legal representation, by communicating with their families if they wish, and by taking other steps to improve the prisoner's situation and, in some cases, to influence the outcome of the proceedings. Our ability to provide such assistance is heavily dependent, however, on the extent to which foreign governments honor their consular notification obligations so that we can have access to detained Americans in time to assist them.

Ensuring worldwide respect for the consular notification requirements of the VCCR and for international law generally is a major responsibility and concern for me. We must be prepared to accord other countries the same scrupulous observance of consular notification requirements that we expect them to accord the United States and its citizens abroad. We cannot have a double standard. State as well as federal executive officials must be committed to compliance with consular notification requirements and must look seriously at allegations of failures of compliance.

David Andrews, my Legal Adviser, is available to discuss this request and may be reached at 202-647-9598. Assistant Legal Adviser for Consular Affairs Catherine Brown (202-647-4415) is also available to answer any questions that you or the Board might have.

Sincerely,

Madeleine Albright

Madeleine K. Albright

Enclosures:

1. Observations concerning the failure of consular notification in the case of Joseph Stanley Faulder
2. *Consular Notification and Access* (DOS Publication 10518)

cc. (w/observations):
Governor Bush
Mr. Ashworthy

COUNTER-MEMORIAL
OF THE UNITED STATES OF AMERICA

CONTRE-MÉMOIRE
DES ÉTATS-UNIS D'AMÉRIQUE

LAGRAND CASE

(GERMANY V. UNITED STATES OF AMERICA)

COUNTER-MEMORIAL

SUBMITTED BY

THE UNITED STATES OF AMERICA

27 MARCH 2000

PART I

INTRODUCTION AND OVERVIEW

1. Pursuant to the Court's Order of 5 March 1999, the United States of America submits its Counter-Memorial in this case.

2. The case results from the failure of competent authorities of the United States to inform Walter and Karl LaGrand without delay of their right to have a German consular post notified of their arrest and detention following their 1982 arrest for murder. The competent authorities of a State Party are required to so inform arrested nationals of another State Party by the last sentence of Article 36(1)(b) of the Vienna Convention on Consular Relations ("the Vienna Convention" or "the Convention").[1] The United States of America and the Federal

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[1] Done at Vienna 24 April 1963. 21 UST 77; TIAS 6820; 596 UNTS 261. Article 36, paragraph (1) of the Vienna Convention states:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> *(a)* consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> *(b)* if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody

Republic of Germany are, and at all relevant times have been, States Party to the Vienna Convention. Accordingly, the failure promptly to inform the LaGrands of the right of consular notification as required by Article 36(1)(b) of the Vienna Convention was in breach of the United States legal obligations to Germany.

3. As will be discussed in Part II, the murder was committed in Arizona, and Walter and Karl LaGrand were arrested, detained, tried, and sentenced under the jurisdiction and laws of Arizona. Arizona officials were the "competent authorities" for purposes of the consular notification obligations of Article 36(1)(b) of the Vienna Convention with respect to them. The United States of America recognizes that under international law, it is internationally responsible for the actions of the State of Arizona.

4. The Federal Republic of Germany began to provide consular assistance to Walter and Karl LaGrand in 1992.

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pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested ... shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation ...

Insofar as we have been able to determine, the German Government did not raise the issue of consular notification with the U.S. Department of State or any other U.S. Federal authority until 22 February 1999, two days before Karl LaGrand's scheduled execution and only eight days before the filing of this case on 2 March 1999.[2]

5. In U.S. practice (and in the general practice of States Party to the Vienna Convention insofar as we can determine), when a sending State raises with the receiving State the possibility that consular notification obligations under Article 36 of the Convention have not been observed, the receiving State ordinarily investigates the allegation. If a violation is confirmed, it is appropriate to apologize for the violation and to take action as required to avoid any recurrence. Accordingly, upon learning of the German Government's concerns that led to the filing of this case, the Department of State initiated a careful inquiry into the consular notification issues related to Walter and Karl LaGrand. The process and results of that inquiry are described in the report at U.S.

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[2] The consular issue appears to have been raised for the first time in the letter from Foreign Minister Fischer to Secretary of State Albright dated 22 February 1999. Memorial of the Federal Republic of Germany dated 16 September 1999 (hereinafter "Memorial" or "German Memorial"), Annex MG 18, p. 528.

Exhibit 1.[3] That report has been provided to the German Government.

6. Through this inquiry, the United States confirmed that the competent authorities of the State of Arizona did not inform Walter and Karl LaG and "without delay" that they could request that a German consular post be notified of their arrest and detention, as required by Article 31(1)(b) of the Convention. The United States of America bears responsibility for such non-performance of U.S. obligations under the Convention by Arizona. Accordingly, the United States acknowledges that, as a result of the failure to inform Walter and Karl LaGrand of their right to consular notification, there was a breach of a legal duty owed by the United States to the Federal Republic of Germany under the Vienna Convention.

7. On 18 February 2000, the U.S. Department of State presented to the Embassy of the Federal Republic of Germany the diplomatic note at U.S. Exhibit 2. In this note, the Department conveyed the apologies and regrets of the United States for the failure to comply with the international

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[3] A small number of documentary exhibits referred to in this Counter-Memorial are reproduced in an accompanying volume of U.S. exhibits. Volumes II and III of Germany's Memorial contain much relevant documentation. Instead of reproducing that material, this Counter-Memorial refers as appropriate to documents contained in Volumes II and III of Germany's Memorial.

legal obligation to inform the LaGrand brothers without delay that they could have a German consular post notified of their arrest and detention. The note also described the extensive efforts that the United States of America is making to improve understanding of and compliance with consular notification obligations throughout the United States, including in Arizona. With this note, the Department also provided a copy of the report of its investigation mentioned above.

8. The nation-wide program of actions aimed at preventing future cases of this kind involving nationals of Germany and of other States Party to the Vienna Convention is further described in Part II of this Counter-Memorial. The Department of State is engaged in an active program of outreach and education with federal, state and local law enforcement, judicial, and other authorities throughout the United States to ensure that those authorities know of and properly implement U.S. consular notification obligations under the Vienna Convention. The goal is to avoid, or in any case to reduce to the minimum, future failures to follow required consular notification procedures by authorities in any U.S. jurisdiction.

9. The United States has also invited the Government of Germany to raise with the Department of State any other cases in which it has concerns about compliance with consular notification obligations. The United States remains prepared to work with Germany to ensure that its nationals are properly informed that they may request consular assistance from Germany's consular posts in the United States.

10. Thus, the United States acknowledges and regrets that the competent authorities in the United States failed to comply with the consular notification obligations contained in Article 36(1)(b) of the Vienna Convention with respect to Walter and Karl LaGrand. The United States has officially apologized for this failure to the Government of Germany, and is taking extensive steps aimed at preventing a recurrence, both in Arizona and elsewhere in the United States. This goes to the heart of what Germany seeks through its first submission.[4]

11. Germany's Memorial and its other submissions set out several other matters on which Germany seeks the judgment of the Court. For the reasons explained in Part III, the Court should find these additional claims to be

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[4] German Memorial, para.7.02(1).

inadmissible. The remaining parts of this Counter-Memorial address the legal bases of Germany's additional claims, should the Court conclude that they are admissible. Part IV refutes Germany's claims of further violations of the Vienna Convention and of general international law. Part V answers Germany's claims regarding "procedural default" and shows that Article 36 does not require States Party to the Vienna Convention to create an individual remedy enforceable by individuals in national criminal proceedings. Part VI answers Germany's claims that the United States failed to comply with legal obligations arising from the Court's 3 March 1999 Order indicating provisional measures. Part VII addresses Germany's demand that the Court require the United States to provide a guarantee against future repetition. Part VIII summarizes the case and contains the U.S. submissions to the Court.

12. As Germany's Memorial makes clear, this case does not concern the position of capital punishment in international law:

> Germany wants to emphasize that its Application is not directed against capital punishment, neither in general nor in regard to the way the death penalty is applied in any particular country.[5]

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[5] German Memorial, para. 1.08.

As the Court has made clear here, as with Paraguay's previous case related to consular notification under Vienna Convention:

> **The issues before the Court in this case do not concern the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes.**[6]

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[6] *LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, p. 15, para. 25 (Hereinafter "Order of 3 March 1999"); *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 257, para. 38.

PART II

THE FACTS

13. The facts of this case are less complex and less contested than those in other cases now before the Court, but there are important omissions from Germany's narrative. There are also some material disagreements on factual inferences to be drawn as to certain matters. This Part seeks not to repeat information contained in the Memorial, but it will address some matters not discussed there that help to explain (if not excuse) the acknowledged failure to comply with Article 36(1)(b). This Part also addresses Germany's attempt to justify its last-minute filing of this case.

CHAPTER I

FACTS REGARDING THE LAGRAND BROTHERS

14. There is no substantial dispute regarding the fact that Walter and Karl LaGrand together attempted an armed bank robbery in Marana, Arizona, on 7 January 1982. During the attempted robbery, Ken Hartsock, the bank manager, was murdered and Dawn Lopez, a bank employee, was repeatedly stabbed and almost killed. Letters from senior German officials to their United States counterparts acknowledge both the brothers' guilt and that they were fairly tried. President Herzog wrote to President Clinton on 5 February 1999 that:

> In no way do I doubt the legitimacy of the conviction nor the fairness of the procedure before the courts of the State of Arizona and the federal courts.[7]

German Minister of Justice Däubler-Gmelin wrote to U.S. Attorney General Reno on 27 January 1999 that:

> It is beyond dispute that the LaGrand brothers committed a dreadful crime, marked by the fact that it was carried out with particular brutality. From my point of view as well, there are no doubts about the gravity of the guilt these sentenced offenders bear for the crime they committed, nor are there any doubts about the fact that the proceedings were conducted under the Rule of Law - ultimately leading

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[7] Memorial, Annex MG 14, p. 511.

> **to imposition of the death penalties with final and binding effect - before the courts of the State of Arizona and before the Federal Courts.[8]**

15. There also does not appear to be dispute regarding the circumstances of the LaGrand brothers' births and their move to the United States, although there are some differences in characterization. The brothers were born out of wedlock in Germany to a mother of German nationality and fathers of U.S. nationality. Walter was born on 26 January 1962 and Karl on 10 October 1963. A third U.S. citizen serviceman stationed in Germany with the U.S. Army, Masie LaGrand, subsequently married their mother and adopted Walter, Karl, and their half-sister. Masie LaGrand brought his German wife and three adopted children to the United States in February 1967. At that time, Walter was five years old and Karl almost three-and-a-half. The brothers never returned to Germany except to live in a U.S. military housing complex associated with the U.S. Army base in Mannheim, Germany, for about five months in 1974. Thus, although the Memorial speaks broadly of "the upbringing of the boys in Germany"[9] in fact they were

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[8] Memorial, Annex MG 20, p. 541.

[9] Memorial, para. 2.03.

largely brought up in the United States after living in Germany for five and three years in their early lives.

16. By the time of the January 1982 murder, the brothers appeared in all respects to be native citizens of the United States. Their language was English, not German. Their appearance, mannerisms, and characteristics were those of citizens of the United States, not of Germany. Indeed, it appears that their adoptive father thought that they had in fact become U.S. citizens, and that the brothers at times identified themselves as U.S. citizens.[10]

17. There is also no dispute that, although they were fully American in outlook and characteristics and spoke little or no German, Walter and Karl LaGrand were in fact German citizens and not citizens of the United States. The fact that the brothers' natural fathers were both U.S. servicemen stationed in Germany was not sufficient to make the brothers United States citizens under the relevant citizenship laws of the United States.[11] In addition, the

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[10] *See* Walter and Karl LaGrand: Report of Investigation into Consular Notification Issues, U.S. Exhibit 1, pp. 2-3.

[11] A child born out of wedlock outside the United States to a non-U.S. citizen mother and a U.S. citizen father in the years 1962 and 1963 would have acquired U.S. citizenship only if, prior to the child's birth, the U.S. citizen father had been physically present in the United States or its outlying possessions for ten years prior to the birth, at least five of which were after the age of 14, and the child's paternity had been established by legitimation before the child's 21st birthday.

fact that the LaGrand children were adopted by a U.S. citizen father did not automatically confer U.S. citizenship upon them. Their adoptive father, Masie LaGrand, could have arranged for Walter and Karl LaGrand to be naturalized as U.S. citizens by completing the necessary application and process.[12] Masie LaGrand never did this however, apparently because he mistakenly thought that his adopted children had automatically become U.S. citizens. Had Walter and Karl LaGrand acquired U.S. citizenship, they would have lost their German citizenship under the U.S.-German Treaty Establishing Friendly Relations of 25 August 1921.[13] The United States accepts, however, that Walter and Karl LaGrand acquired German nationality through birth in Germany to a German mother and remained German nationals until their deaths in 1999.

18. There also is no substantial dispute that Walter and Karl LaGrand had difficult and deeply troubled lives. As children, they repeatedly experienced rejection by their

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[12] Masie LaGrand could have applied for naturalization of his adopted children pursuant to former Section 323 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1434, until its repeal in 1978; after 1978, he could have applied pursuant to what is now Section 320, 8 U.S.C. 1433, provided the child to be naturalized was under the age of 18. (Section 323 was repealed in 1978 by Section 7 of Public Law 95-417.)

[13] Signed Aug. 25, 1921; entered into force Nov. 11, 1921. 42 Stat. 1939; 8 Bevans 145; 12 LNTS 192.

mother and their adoptive father. During their early years in Germany, their care was at times turned over to institutions. After they moved to the United States at ages five and three, this pattern continued. Their mother took little or no interest in the brothers and welcomed their placement in foster care. Their adoptive father apparently became abusive and in any event eventually abandoned the brothers and their mother and sister. Arizona State records contain numerous details of how the brothers felt rejected by their mother, angry, and frustrated by their situation. Eventually the brothers drifted into anti-social and ultimately violent criminal behavior, culminating in the murder of 7 January 1982.

CHAPTER II

THE MULTIPLE APPELLATE PROCEEDINGS

19. Germany's Memorial lists the extensive series of appellate and other legal proceedings brought by the LaGrand brothers to challenge their convictions and sentences.[14] Because the brothers faced capital punishment, these appeals were particularly rigorous. The convictions and sentences of the Arizona trial court were first reviewed and affirmed by the Arizona Supreme Court. The United States Supreme Court then declined to exercise its discretion to grant further review.[15] As was their right, the LaGrands then sought review of their convictions and sentences by a federal district court under the habeas corpus provision of the United States Constitution. (Habeas corpus proceedings provide a vehicle for persons in detention to challenge the lawfulness of their detention in a court of law.) The federal district court upheld the convictions and sentences. Its decisions were then reviewed and affirmed by an intermediate federal court of

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[14] Memorial, para. 2.04 *et seq.*

[15] *Arizona v. Walter Burnhart LaGrand*, 153 Ariz. 21, 734 P.2d 563 (1987) (Memorial, Annex MG 3, p. 293), *cert. denied*, 484 U.S. 872 (1987); *Arizona v. Karl Hinze LaGrand*, 152 Ariz. 483, 733 P.2d 1066 (1987) (Memorial, Annex MG 4, p. 305), *cert. denied*, 484 U.S. 872 (1987).

appeals, and the United States Supreme Court then declined for a second time to exercise its discretionary jurisdiction.[16] Through these appeals, appropriate judicial authorities determined that the LaGrands' defense lawyers had provided a constitutionally sufficient level of representation and that the sentencing judge had appropriately considered the mitigation and other evidence relevant to sentencing.

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[16] *Karl and Walter LaGrand v. Lewis*, 883 F.Supp 451, 469 (1995), *aff'd*, 133 F.2d 1253 (9th Cir. 1998), *cert. denied*, 119 S.Ct. 422 (1998) (Memorial, Annexes MG 8-11, pp. 453 *et seq.*)

CHAPTER III

EFFORTS BY THE UNITED STATES TO IMPROVE COMPLIANCE

20. The United States accepts that effective compliance with the consular notification requirements of Article 36 of the Vienna Convention requires constant effort and attention. As described in the attached Declaration of M. Elizabeth Swope, the Department of State's Senior Coordinator for Consular Notification,[17] the Department of State is working intensively to improve understanding of and compliance with consular notification and access requirements throughout the United States, so as to guard against future violations of these requirements.[18] This effort has included the January 1998 publication of a booklet entitled *Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials To Assist Them,*[19] and development of a small reference card

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[17] Declaration of M. Elizabeth Swope of 14 March 2000, U.S. Exhibit 3.

[18] *Ibid.*

[19] Excerpts are reproduced at U.S. Exhibit 4. A copy of this publication is being provided to the Library of the Court. Courtesy copies were provided in 1998 to all Embassies in Washington, D.C., and later to all foreign consulates in the United States.

designed to be carried by individual arresting officers.[20] As of March 2000, the Department had distributed approximately 44,000 booklets and over 300,000 cards to arresting officers, prosecutors, and judicial authorities in every state and in other jurisdictions such as the District of Columbia. The Department also has made the booklet available through libraries and the Internet, through which it has been accessed thousands of times.[21] The booklet is now widely available to, and used by, criminal defense lawyers, detainees, and members of the public as well as by federal, state, and local officials.

21. Consular notification and access obligations have also been reviewed at numerous training seminars and meetings throughout the United States. Many of these events have been held in states with significant populations of foreign nationals. Department of State officials have traveled for this purpose to Arizona, California, Florida, Illinois, Massachusetts, New Jersey, New Mexico, New York, North Carolina, Texas, Virginia, and Washington State. Department officials have also spoken

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[20] U.S. Exhibit 5.

[21] The booklet is available at: http://www.state.gov/www/global/legal_affairs/ca_notification/ca_prelim.html

about consular notification and access issues at a number of regional or national events, such as special conferences of the states that border Mexico, seminars on international prisoner transfer, international and regional police chiefs and sheriffs meetings, and meetings of federal and state prosecutors.

22. Similar educational efforts in other states of the United States are continuing. In coming months, the Department of State will be conducting programs on consular notification in California, Hawaii, Nevada, Pennsylvania, Texas, and Utah.[22]

23. As part of its ongoing efforts in many states, the Department of State has worked closely with the State of Arizona, which has taken a number of specific steps to ensure that consular notification is provided when required. The Attorney General of Arizona sent all Arizona county attorneys a memorandum advising them of the requirements of the Vienna Convention and providing excerpts from and information about the Department of

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[22] So that the full scope of consular notification obligations will be understood and observed, the Department is also working to educate coroners and other officials responsible for reporting deaths (Vienna Convention Article 37(a)) and judges involved in the appointment of guardianships (Article 37(b)). It has also taken steps to ensure the provision of consular notification in cases of ship wrecks and air crashes (Article 37(c)).

State's booklet, and has also written to the Chief Justice of the Arizona Supreme Court suggesting a change in the rules of the courts of Arizona that would help ensure compliance. The Arizona Department of Corrections has compiled and distributed within the Department of Corrections a list of consular offices in the United States in or nearest to Arizona, and has adopted new consular notification procedures.[23] These and other specific instructions issued by Arizona authorities have been supplemented by wide distribution within Arizona of the Department of State's booklet, and by numerous training sessions. The Arizona Attorney General's Office is continuing to work on these and other initiatives to improve understanding of and compliance with consular notification and access obligations throughout the state.

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[23] Pursuant to these new procedures, Karl and Walter LaGrand were given formal notification of their right to contact their consular officials on December 21, 1998. Memorial, Annex MG 12, p. 499. Clearly this notice came too late to constitute compliance with Article 36 in this case, but it is concrete evidence that the procedures now in place in Arizona are being followed.

CHAPTER IV

GERMANY'S SPECULATIVE AND UNJUSTIFIED CLAIMS ABOUT THE IMPACT OF CONSULAR ASSISTANCE

Section I. Introduction

24. Although the parties seem to be in broad agreement about many of the facts, there are some significant differences. The most important relate to Germany's suppositions about what might have occurred had the LaGrand brothers been properly informed of the possibility of consular notification.[24] First, the Memorial presumes that, had the brothers been told in January 1982 that a German consular post could be notified of their arrest, they would have requested such notification. (The notification would have been given to the German Consulate General in Los Angeles, approximately 700 kilometers/415 miles away from Marana, Arizona.) Second, the Memorial argues that German consular officers from Los Angeles would have given rapid and extensive assistance to the LaGrands' defense counsel before the LaGrands' December 1984 sentencing, including obtaining from Germany evidence about

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[24] Memorial, paras. 4.53 *et seq.*

the LaGrands' early childhoods before they moved to the United States in February 1967. Finally, the Memorial insists that such consular assistance would have fundamentally changed the outcome of the sentencing proceedings, because consular officers would have provided important evidence not otherwise available to the judge that would have persuaded him not to sentence the brothers as he did. All three lines of argument rest on speculation about what might have happened had the LaGrand brothers been told in 1982 that they could have the German Consulate General in Los Angeles notified of their arrest and detention. None withstands analysis.

Section II. The Brothers Had No Ties with Germany

25. First, the evidence undermines rather than supports Germany's belief that the LaGrand brothers would have requested in 1982 that the German Consulate General in Los Angeles be notified. As the Memorial recognizes, the Vienna Convention leaves it entirely to the arrested person to request consular notification.

> [I]t is for him or her alone to decide whether he or she wants the consulate to be contacted or not.[25]

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[25] Memorial, para. 4.11. Germany seems to criticize Arizona authorities for not directly informing the German Consulate General of the LaGrand's arrest, Memorial para. 4.12. However, as the Memorial

However, foreign nationals -- particularly those who do not have strong connections with the sending State -- do not uniformly request that their consular officials be notified after they are informed that such notification is a possibility.[26]

26. As described in the report of the Department's investigation,[27] the LaGrand brothers were thoroughly American in identity and outlook when arrested in 1982. The German Government played no role in their lives after they moved to the United States in 1967 at ages five and three. Neither brother had ever been individually documented as a German national, even when they returned to Germany for a few months in 1974, when they appear to have traveled on U.S. military travel orders. There is no indication that either brother viewed himself as German in 1982, or would have looked to the German Government as a potential protector or source of assistance. Even after German consular officials established contact with the

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acknowledges, such "notification of the consulate without or against the will of the person concerned is excluded." Memorial, para. 4.11.

[26] Declaration of Edward Betancourt, U.S. Exhibit 8, p. 5.

[27] U.S. Exhibit 1, p. 3.

LaGrands in 1992, Walter LaGrand at least twice refused consular visits.[28]

27. At the time of their arrests, the brothers did not identify themselves to the arresting officers as Germans. The evidence indicates that Walter identified himself to detaining authorities as a U.S. citizen; Karl either made a similar identification, refused to state his citizenship, or did not know his citizenship.[29] The family and friends that Walter and Karl identified as points of contact when arrested were all in Arizona. The brothers' cultural identity was American throughout. It is thus implausible that two young men who showed little sense of being German and who were totally disconnected from Germany would have asked the Arizona officials responsible for their arrest or detention to notify the German Consulate General in Los Angeles that they had been arrested.

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[28] U.S. Exhibit 1, p. 9.

[29] Indeed, Germany's Memorial implies that the brothers may have come to realize their German nationality only after their arrest. Memorial, para. 6.83. ("[A]fter the brothers had become aware of their German nationality, they raised the violation of Article 36 of the Vienna Convention ... .")

Section III. The Memorial's Unjustified Claims About Consular Assistance

28. Nor does the Memorial credibly support its contention that a German consul would have immediately assisted the LaGrand brothers or significantly aided their legal defense, had the German Consulate General in Los Angeles been notified earlier.[30] Reference to present-day policies does not prove how German consuls performed their duties eighteen years ago. Part V considers the limited and discretionary nature of a consul's role when a national is detained, and shows how that role is often quite different from the idealized portrait presented in the Memorial. Most importantly, consular officers cannot act as lawyers. The assistance they provide to a defendant in a criminal proceeding is limited to assisting in obtaining legal counsel and then assisting legal counsel -- if

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[30] Perhaps recognizing the speculative character of many of its factual arguments, Germany contends that "the burden of proof for the impact of the violation is to be borne by the United States." Memorial, para. 4.52. Germany cannot so easily evade the basic principle that "[u]ltimately, ... it is the litigant seeking to establish a fact who bears the burden of proving it." *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984*, p. 437, para. 101. The ambiguities and unproven assumptions throughout Germany's case involve matters that are or can be known to Germany. The Court "cannot ... apply a presumption that evidence which is unavailable would, if produced, have supported a particular party's case; still less a presumption of the existence of evidence which has not yet been produced." *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening), Judgement of 11 September 1992, I.C.J. Reports 1992*, p. 399, para. 63.

requested -- within the limits of the consular officer's authorities and resources.

29. Germany has provided little support for its assertions that German consular officers would have retained different defense lawyers, that they would have aided the LaGrands' defense counsel in 1982-84 by seeking additional information about the brothers' early childhoods in Germany, or even that German consular officials would have responded at all. To show what a German consul might have done, the Memorial cites a 1993 memorandum of law filed by a U.S. defense lawyer in a U.S. criminal proceeding.[31] That memorandum contains several careful references to what German consuls "could have" or "may have" done, not what they "would do" or "had done". These hedged speculations in a legal brief are not evidence. The Memorial also cites the German Federal law on Consular Assistance and a current Circular Order of the German Foreign Ministry describing the responsibilities of German consuls.[32] There is a suggestion that these current regulations continue past practices, but there is no claim that they correspond to the regulations in force in 1982 or

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[31] Memorial, para. 4.53 n. 214, citing a brief of a LaGrand lawyer at Annex MG 46, p. 942.

to the practices of the German Consulate General in Los Angeles at that time. Nowhere is there any statement by any informed German official familiar with German consular practice in Los Angeles in 1982.

30. The actions of the German Consulate General in Los Angeles when it ultimately learned of the LaGrand brothers in June 1992[33] may offer a more realistic indication of consular practice. The Consulate General's response suggests that German authorities had doubts about whether the brothers were German nationals at all, or whether urgent consular assistance to them -- or perhaps any assistance -- was appropriate. Clearly, the Consulate General did not rush to assist the brothers. Apparently, two other Germans in prison with the LaGrands were receiving consular visits and prompted a contact between the brothers and the Consulate General in June 1992. The Memorial states that the German Consulate General thereafter "[i]mmediately ... engaged in a careful and comprehensive inquiry into the nationality status of the two brothers."[34] That inquiry was indeed "careful and

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[32] Memorial, para. 4.54.

[33] Memorial, paras. 2.06 and 3.73.

[34] Memorial, para. 3.73.

comprehensive" -- indeed, it appears to have been slow, deliberate, and even skeptical. Not until November 1992 did a German consular officer write to the U.S. Immigration and Naturalization Service for information about the LaGrands' immigration status in the United States. Only on 8 December 1992 did a German consular officer visit the LaGrands.[35] The LaGrands' German nationality was not officially documented by Germany until 15 March 1993.[36]

31. The German Consulate General's slow and cautious response conflicts with Germany's assertions that its consuls would have sprung immediately into action in 1982, had they learned that two native English-speakers long resident in the United States, but who claimed to be German, faced charges for a murder in a small Arizona town. It seems particularly doubtful that consular officials would have responded quickly because the brothers had no documentation at hand to prove that they were German nationals. They had no German passport or identification card, having been included in their mother's long-since-expired German passport when they first came to the United States as small boys in 1967.

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[35] Memorial, para. 2.06.

[36] Memorial, para. 3.73 and Annex MG 41, p. 801.

32. It is also important to remember that the LaGrands' defense was at all times the responsibility of their defense attorneys. Just as Germany's compilation of information from Germany about the LaGrands after 1992 was at the behest of the lawyers then assisting them, the LaGrands' defense lawyers in 1982-1984 would have decided what requests for assistance to make to a consular officer. There is no indication that Walter or Karl LaGrand's defense lawyers in 1982-1984 would have asked German consular officials to obtain additional evidence about the brothers' lives in Germany. Both defense lawyers knew that the LaGrands had been born in Germany, but apparently elected not to seek evidence about their early childhoods there.

33. The German Memorial castigates the brothers' defense counsel, *inter alia*, because they did not "raise or investigate mitigating circumstances linked to the upbringing of the brothers in Germany under extremely difficult social conditions."[37] If the LaGrands' defense counsel warrant the criticisms directed against them, then it is hardly likely that they would have sought help from a German consular officer to obtain such evidence. However,

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[37] Memorial, para. 2.03. *See* Memorial, paras 4.68-4.79.

it may well be that the LaGrands' defense counsel simply did not think such evidence would add much strength to the brothers' defense.

34. It was not unreasonable for the LaGrands' trial counsel not to seek additional information from Germany. Information about the brothers' early years was available from Walter and Karl LaGrand themselves and from their sister, and was reflected in pre-sentence materials prepared for the sentencing judge. Moreover, by 1984, when the brothers were sentenced, their early years in Germany were remote and relatively less significant than the seventeen years since they left Germany. Those seventeen troubled years were well documented. Thus, ample mitigation evidence about the LaGrands' dysfunctional childhoods, including their early years in Germany, was provided to the Court. Defense counsel did not need to reach for additional documentation from Germany relating to the time years before when the brothers were five and three years old.

35. German consular officials' actions after they finally began to assist the LaGrand brothers also conflict with Germany's claims. Germany explains its last-minute filing by arguing that German officials only learned at a

clemency hearing on 23 February 1999 that Arizona authorities knew of the LaGrands' German nationality long before. We believe this stems from a reference made by an attorney for Arizona at the clemency hearing to the brothers' 1984 pre-sentence reports,[38] official court documents crucial to understanding the sentences imposed.[39] The 1984 reports were available to German officials and are the second exhibit to Germany's Memorial. If they were not reviewed by German consular officials after they learned of the case in 1992, then those officials clearly did not see their role to include evaluating the evidence considered at sentencing. This directly conflicts with Germany's claims that a German consular officer in 1982-1984 would have worked to evaluate and supplement the evidence presented to the judge regarding the LaGrands' troubled early childhoods.

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[38] Memorial, Annex MG 2, pp. 253-289. Walter and Karl LaGrand are identified on the first pages of their 1984 pre-sentence reports as citizens of Germany. *Ibid.*, pp. 253 and 268.

[39] The Memorial does not clearly describe Germany's understanding of events at the 23 February 1999 clemency hearing, although it suggests that the hearing somehow revealed that Arizona officials knew of the LaGrands' German nationality as early as 1982. Memorial, para. 1.03. Our understanding is that Counsel for the State of Arizona referred to the 1984 pre-sentence report at the 23 February hearing, in order to show that evidence about the brothers' childhoods was available at sentencing. German representatives apparently viewed this as an indication of bad faith by Arizona.

36. If German consuls never requested or read the 1984 pre-sentence reports, claims of their diligence and effective assistance are unpersuasive. But if German consuls did review them, Germany knew long before the last-minute filing of this case that some Arizona officials had learned of the LaGrands' German nationality during the 1980s.

Section IV. The Memorial's Exaggerated Claims About the Potential Impact of Mitigation Evidence

37. The Court should also reject the Memorial's supposition that Germany would have located mitigation evidence that surely would have persuaded the sentencing judge to be lenient. The Memorial makes such claims many times, with varying degrees of assurance,[40] often echoing arguments made to and rejected by United States courts. Yet, as Germany's Memorial acknowledges, the brothers' lawyers did ask the sentencing judge to consider in mitigation Walter and Karl's grim and dysfunctional family

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[40] At para. 4.51, the Memorial is categorical: had consuls been involved, "the brothers would not have been executed." Para. 1.01 is somewhat less confident. ("There are compelling reasons to believe that the LaGrands would have escaped the death penalty ... .") Para. 4.56 seems more careful. (Assistance "likely would have saved their lives.") None of these statements is credible in light of the circumstances described here.

background.[41] Their deprived and unsettled childhood was described in the pre-sentence reports and in testimony by the two defense expert witnesses and of the brothers' sister at the pre-sentence hearing. The pre-sentence reports included a great deal of information, and concluded that, in mitigation, the judge could consider the fact that the LaGrands' actions "may have partially resulted from a poor home environment, lack of family stability, broken home, poverty, and/or a lack of education."[42]

38. The reports offered significant information about the LaGrands' troubled childhoods, including the periods of their early childhood spent in Germany. For example, the pre-sentence report for Walter LaGrand attaches a more detailed earlier report dated 4 December 1980, which contains, *inter alia*, the following information:

> The defendant [Walter LaGrand] was second of three illegitimate children born of different fathers while his mother lived in Augsburg, Germany. He reports that his father was Puerto Rican and had left without marrying his mother before the defendant was born. He reports that his mother placed the children in a convent when they were very young, as she was unable to take care of them because she was required to work to support the family. She eventually married a

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[41] Memorial para. 4.61.

[42] Memorial, Annex MG 2, p. 259.

> Black American soldier, who adopted her three children, at which time the defendant's mother retrieved the children from the convent to live with her and her husband."

(This attachment is contained in the Arizona court's file; we do not know if it was included with the report as obtained by German consular officials. It is reproduced at U.S. Exhibit 6.) One of the psychiatrists who testified in the sentencing phase also noted that the boys' early lives in Germany had been especially difficult.[43]

39. Thus, the sentencing judge had information about the LaGrands' first five and three-and-a-half years of life in Germany, and additional evidence about those few years in Germany would have been cumulative. Defense counsel and the judge also had available extensive information of similar character about the brothers' troubled family lives during the much longer period after they moved to the United States. No evidence about the LaGrands' early years in Germany was as significant as this chronicle of their subsequent experiences over the seventeen years between leaving Germany and being sentenced in 1984.

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[43] Transcript of the Aggravation-Mitigation Hearing, Memorial, Annex MG 5, pp. 355 and 363.

40. There is no doubt that the Judge Hannah considered the mitigating circumstances presented to him. He stated that:

> I've also considered in mitigation their unhappy and disruptive childhoods and family lives, lack of a male role-model, their expressed remorse ... and I have considered the psychological and psychiatric evidence offered on their behalf and the other evidence that was presented at the mitigation hearing, both documentary and oral.[44]

Whatever mitigating evidence Germany might have added at the sentencing stage would not have portrayed a fundamentally different picture.

41. The Memorial correctly points out that, under Arizona law, a difficult childhood or family history can be mitigating, but it also acknowledges that Arizona law also requires a causal connection between the upbringing and the murder.[45] The Memorial offers only speculation that the LaGrands' early experiences in Germany had some special causal connection to the murder, or were more relevant to the murder than the subsequent fifteen years after they left Germany. Arizona has identified numerous cases in

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[44] Transcript of Entry of Judgment and Sentencing, 14 December 1984, Memorial, Annex MG 6, p. 440.

[45] Memorial, para. 4.65.

which such mitigation evidence was offered but was not shown to have been linked to the criminal behavior.[46]

42. More importantly, Arizona law requires that mitigation evidence be balanced by the court against evidence that the crime was "aggravated" and that the brothers would continue to be a danger to society. Such evidence included the graphic and deeply disturbing testimony of Dawn Lopez, who witnessed the murder of the bank manager and was herself stabbed repeatedly. If it chooses to review the videotapes provided to the Court by Germany, the Court will see that even seventeen years later, at the hearings of the Arizona Board of Executive Clemency, Dawn Lopez' horror at the memory of her experience was undiminished. The evidence in support of capital punishment also included evidence of prior violent behavior by both brothers. The sentencing judge also found other aggravating circumstances, including that the murder was committed "in the expectation of the receipt of something of monetary value," and that it was committed

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[46] *See, e.g., State v. Clabourne*, 298 Ariz. Adv. Rep. 12 (1999); *State v. Djerf*, 191 Ariz. 583, 959 P.2d 1274 (1998); *State v. Lee* (1), 189 Ariz. 590, 944 P.2d 1204 (1997); *State v. Hedlund*, 185 Ariz. 567, 917 P.2d 200 (1996); *State v. Bolton*, 182 Ariz. 290, 896 P.2d 830 (1995); *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993); *State v. White*, 168 Ariz. 500, 815 P.2d 869 (1991).

> in an especially heinous, cruel or depraved manner, stabbing a helpless, defenseless man 26 times, inflicting gratuitous violence on that victim after threatening his life several times while he was a helpless captive and kept uncertain as to his fate.[47]

The judge concluded that "the murder was senseless and the manner of causing death was savage."[48]

43. It is extremely doubtful that any further evidence about the boys' early childhood that might have been added in 1984 would have changed the judge's finding that there were "no mitigating circumstances sufficient to call for leniency or to outweigh the aggravating factors."[49] Given the information already available to the judge, and the significant aggravating circumstances he identified, the claim that some additional evidence about the brothers' early childhoods would have changed the balance is simply not persuasive.

44. Arizona officials have indicated that imposition of capital punishment was consistent with the outcome in other cases in which similar aggravating and mitigating circumstances were present, and have identified other

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[47] Transcript of Entry of Judgement and Sentencing, 14 December 1984, Memorial, Annex MG 6, p. 439.

[48] *Ibid.*, p. 440.

similar murder cases in which the defendant was also sentenced to capital punishment. In the same vein, Detective Weaver Barkman, who investigated the murder and received Karl LaGrand's confession, has recently confirmed that imposition of capital punishment in this case seemed appropriate to him at the time. Germany's Memorial emphasizes Mr. Barkman's supposed doubts about the LaGrand brothers' sentences, based on the affidavit of a U.S. Federal Public Defender.[50] Mr. Barkman, however, denies the accuracy of the comments attributed to him in that affidavit. Instead, in a recent Declaration, he has stated that at the time he was not opposed to or disturbed by the sentences imposed.[51]

45. Thus, the Court should not accept the Memorial's central suppositions that the LaGrands would have requested consular assistance from a country with which they had little connection; that, if contacted, German consuls in 1982-84 would have significantly assisted their defense attorneys; and that any assistance that German consuls might have provided would have persuaded the judge not to

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[49] *Ibid.*, pp. 440-441.

[50] Memorial, para. 4.67. The Federal Public Defender's affidavit is Germany's Annex MG 53, pp. 1219-1220.

[51] Weaver Barkman's Declaration of 11 February 2000 is U.S. Exhibit 7.

pass sentence as he did. Germany, which has the burden of establishing the facts underlying its arguments, offers little but supposition to support these claims. Matters such as the LaGrand brothers' lack of connection with Germany, the cautious conduct of German consuls in 1992, and the extensive evidence about the brothers' past lives already available to the Arizona court when the LaGrands were sentenced, shows that Germany's suppositions are not persuasive.

PART III

ADMISSIBILITY

CHAPTER I

INTRODUCTION

46. Germany's final submissions[52] call for four forms of relief against the United States. Briefly stated, Germany asks the Court to declare or order that:

(1) the United States violated Article 36(1)(b) of the Convention and related legal obligations;

(2) certain rules of U.S. domestic law, particularly the doctrine of procedural default, violate Article 36(2) of the Convention;

(3) the United States violated international legal obligations related to the Court's Order of 3 March 1999; and

(4) the United States must provide Germany a guarantee against recurrence.

Jurisdiction as to all four claims is asserted to exist under Article I of the Optional Protocol to the Vienna

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[52] Memorial, para. 7.02.

Convention,[53] to which both Germany and the United States are parties.

47. The United States acknowledges that there was a breach of the U.S. obligation under Article 36(1)(b) of the Convention promptly to inform the LaGrand brothers that they could ask that a German consular post be notified of their arrest and detention. The United States has apologized to Germany for this breach, and is taking extensive measures seeking to avoid any recurrence. In relation to Germany's first submission, the United States does not contest the Court's jurisdiction under the Optional Protocol to enter a judgment regarding this acknowledged breach of Article 36(1)(b).

48. Without prejudice to its position in any further proceedings in this case, or in any future cases where jurisdiction is claimed to exist under the Optional Protocol, the United States will not here address the Court's jurisdiction to entertain Germany's remaining claims. Instead, for the reasons set out in this Part, the United States urges that the Court hold those remaining claims to be inadmissible.

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[53] Optional Protocol to the Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, done at Vienna 24 April 1963, 21 UST 325, 596 UNTS 487.

CHAPTER II

GERMANY'S OTHER CLAIMS ARE INADMISSIBLE

49. Admissibility requires the Court to weigh whether characteristics of the case before it, or special circumstances related to particular claims,. may render either the entire case or particular claims inappropriate for further consideration and decision by the Court. Assessing admissibility involves careful analysis of the particular characteristics of cases and claims, the positions of the parties, the role and responsibilities of the Court in the international system, and the application of the Statute and Rules of Court. In the circumstances here, significant factors weigh against admitting the claims that underlie Germany's second, third, and fourth submissions.

Section I. The Court Need Only Address Germany's First Submission in Order to Do Justice Between the Parties

50. The United States does not contest Germany's basic claim of a breach of the notification obligation under Article 36(1)(b) of the Vienna Convention, and has expressed its regret that there was such a breach in the cases of Karl and Walter LaGrand. Extensive remedial actions are being taken in order to reduce the chances of

recurrence. In these circumstances, the Court can render a judgment recording the breach of Article 36(1)(b), the apology of the United States, and noting that appropriate remedial measures are being taken. Such a judgment would resolve and do justice as to the central dispute between the Parties and affirm the importance of the Vienna Convention in international relations. The Court need not conduct the additional proceedings required to hear and decide Germany's remaining claims in order to discharge its role appropriately. (In any case, as the following Parts show, Germany's remaining claims are deeply flawed on their merits.)

Section II. Germany's Remaining Claims Are Inadmissible Because Germany Asks the Court to Assume an Inappropriate and Unauthorized Role as the Overseer of U.S. National Courts

51. The claims underlying Germany's second, third, and fourth submissions are inadmissible because Germany seeks through those claims to have the Court play the role of ultimate court of appeal in national criminal proceedings. Many of the Memorial's arguments, particularly regarding the rule of procedural default, but as to other issues as well, ask this Court to substitute its judgment for considered decisions of national courts in

criminal cases. This would improperly transform and expand the Court's role, making it the overseer of national judicial systems in criminal cases.

52. Both in its Order of 9 April 1998 in *Paraguay v. United States*, and again in its Order of 3 March 1999 in this case, the Court properly observed that:

> [T]he function of this Court is to resolve international legal disputes between States, *inter alia*, when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal.[34]

Germany's Memorial, however, asks the Court to address and correct not only claims under international law but asserted violations of U.S. law and errors of judgment by U.S. judges. The Memorial's lengthy discussions of U.S. domestic law are replete with invitations for the Court to take corrective action because U.S. courts have not applied U.S. law "correctly." A sample passage argues that:

> [A]n analysis of United States law and jurisprudence convincingly shows that Art. 36(1) constitutes an individual right both under the domestic law of the United States and according to the interpretations of

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[34] *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 257, para. 38; Order of 3 March 1999, para. 25.

> the Vienna Convention by U.S. courts. Regrettably the U.S. courts have not applied these holdings ... .[55]

In the same vein, the Memorial asks the Court in effect to overrule the judgments of U.S. courts regarding the adequacy of the LaGrand brothers' legal representation.[56]

53. Germany aims particularly harsh criticism at the decisions of United States courts to decline appellate or *habeas corpus* review of claims not initially made at trial (the doctrine of procedural default).[57] In a heated passage, the Memorial contends that U.S. courts (including the Supreme Court of the United States) acted in a "wholly inappropriate" manner when they:

> chose to apply in a persistent and rigorous manner certain rules of U.S. domestic law, in particular the rule of "procedural default", whose effect was that no remedy was available to the LaGrand brothers ... . It was this deplorable attitude in disregard of the United States' obligations under the Vienna Convention, despite the obviousness of the violations committed and sustained over a long period, which eventually barred any relief and led to the execution of Walter and Karl LaGrand.[58]

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[55] Memorial, para. 4.119.

[56] *See, e.g.*, Memorial paras. 4.42, 4.44, 4.68, 4.70 and 4.73 *et seq*.

[57] Memorial, paras. 4.26 *et seq*.

[58] Memorial, para. 4.81.

54. Although the Memorial denies the intention to do so,[59] the texture of its arguments, as well as passages like those quoted above, show that the Court is being asked to sit as an international court of criminal appeal, and to set aside both criminal court judgments and the operation of rules of criminal procedure. This is a role this Court is not empowered or constituted to perform. The Court should decline to adopt it by deciding Germany's remaining claims.

Section III. The Circumstances and Timing Chosen by Germany for Filing its Case Render Germany's Third Submission Inadmissible

55. The two previous objections to admissibility relate to the second, third, and fourth submissions in Germany's Memorial. There are further compelling reasons why the Court should find inadmissible Germany's third submission, concerning the Court's Order of 3 March 1999. These follow from the extraordinary manner in which Germany chose to bring this case. By acting as it did, Germany created a situation that was highly unreasonable and prejudicial, both to the United States and to the proper

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[59] Memorial, para. 1.09. ("Neither does Germany intend, or has ever intended, to use the International Court of Justice as a court of criminal appeals.")

administration of justice. These circumstances render further proceedings to address Germany's claims regarding the Order of 3 March inappropriate.

56. Germany's choice of timing precluded both proper proceedings in the Court and a considered response by the United States to any order the Court might issue. The case did not have to proceed this way. The Memorial shows that German officials learned of Walter and Karl LaGrand in June 1992.[60] During the ensuing six-and-a-half years, Germany did not express concern about the brothers' cases or protest their treatment to the Department of State or other U.S. Federal authorities. The cases were first raised with the Department of State on 27 January 1999, but then in the form of an appeal to the Secretary of State against the application of capital punishment.[61] The cases' consular notification aspect was not raised with the Department of State until 22 February 1999, two days before Karl LaGrand's execution.[62]

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[60] Memorial, para. 2.06.

[61] Letter of Foreign Minister Fischer to Secretary of State Albright, 27 January 1999, Memorial, Annex MG 17, p. 524.

[62] Letter of Foreign Minster Fischer to Secretary of State Albright, 22 February 1999, Memorial, Annex MG 18, pp. 528-531.

57. Germany then chose to file its skillfully prepared Application and Request for the Indication of Provisional Measures in The Hague after normal business hours at 7:30 PM on 2 March 1999,[63] a little over 27 hours before the scheduled execution. Germany's decision to file at this extraordinarily late stage made it impossible for the Court to respond as Germany requested, except by acting *ex parte* and without allowing the Respondent State to be heard. Germany's choices thus precipitated a profound and unsettling change from the previously uniform practice of the Court. Even in cases involving the gravest allegations of ongoing genocide, armed attacks, or other matters threatening immediate and widespread loss of life, the Court has never been placed in a situation where it felt constrained to act in less than 24 hours and without hearing the Respondent.

58. Germany is correct that there is no uniform "statute of limitations" in international law, nor are there clear requirements dictating when a case must be filed with this Court. Some international controversies do linger for years before they are brought to the Court.

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[63] Order of 3 March 1999, p.9.

Nevertheless, the Court should not, through continued proceedings on Germany's third submission, sanction the mode of proceedings brought about by the Applicant's choices. Those choices resulted in the Court having to act without full information, without a hearing and full deliberation, and without regard to the normal requirements to treat parties with equality and to accord each the opportunity to be heard. Finding Germany's claims involving the Court's 3 March Order admissible can only establish such last-minute filings as an acceptable pattern for proceedings in this Court.

59. Perhaps recognizing the inappropriate position in which it placed the Court, the Memorial adopts a somewhat defensive tone regarding the timing of the 2 March filing. It argues that neither international law nor good faith required Germany to consult with the United States concerning its plan to bring this case.[64] It also contends that the late filing was justified by Germany's discovery at the 23 February clemency hearing that Arizona had supposedly acted in bad faith.[65] Germany contends that

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[64] Memorial, para. 3.63 *et seq.*

[65] Memorial, para. 3.65. ("It was only seven days before it brought the dispute to the Court that Germany had become aware of the relevant facts underlying its claims.")

Arizona authorities long knew that the LaGrand brothers were German nationals, but had wrongly concealed their knowledge until it was accidentally revealed by a prosecutor at the clemency hearing.[66]

60. As discussed in Part II, it is odd that German officials had not long before read the pre-sentence reports referred to at the 23 February hearing. They were the key documents considered at the 1984 sentencing proceedings. They were available to the LaGrands' lawyers and to German officials, and are among the exhibits to Germany's Memorial.[67] It is hard to understand how these reports were not already familiar to German consular officers, particularly in light of Germany's sweeping claims regarding the vigor and effectiveness of its consular assistance.

61. Germany's plea that it was ignorant of the facts until 23 February 1999 should not be accepted as

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[66] The German Memorial describes as "shocking" the supposed revelation by counsel for Arizona at the clemency hearing. Memorial, para. 3.65. Arizona's counsel was in fact simply arguing that the failure of consular notification was not prejudicial, since mitigation evidence of the kind Germany said it might have provided was in fact available at the time, as shown by the 1984 pre-sentence reports. Since those reports were available to all parties and are understood to be central to any sentencing procedure in the United States, counsel for Arizona had no reason to think that referring to them would be "shocking" to anyone, and certainly not to diligent German consular officials.

[67] Memorial, Annex MG 2, p. 251.

justification for its last-minute filing for another reason as well. Although it had years to do so, Germany never raised the consular notification issue with the U.S. Department of State so that the facts could be investigated. The practice of investigating complaints of possible failures of consular notification is well established under the Vienna Convention, and is routinely followed by both Germany and the United States, as shown in Part V below. As early as 1992, German officials could have asked the Department of State to investigate the possible violation of Article 36 of the Vienna Convention, including when the LaGrands' German nationality was known to the competent authorities. Indeed, as noted above, the Department of State in 1998 expressly invited all Embassies in Washington to bring possible failures of consular notification to its attention, so that it could investigate and take any appropriate action.

62. Had Germany raised its concerns in a reasonable and timely way, there would have been time for U.S. authorities to carry out a thorough investigation of the facts. Through the investigation conducted in 1999-2000, after Germany finally raised the matter, the Department of State determined that Arizona officials who were "competent

authorities" for purposes of the Convention had information about the LaGrands' German nationality sometime between mid-1983 and the end of 1984. The Department regrets the evident misunderstanding between Arizona and German officials about when this information about the LaGrands' nationality was available, and to whom. Whatever the reasons for that misunderstanding, it would have been avoided had German officials brought the LaGrand case to the attention of appropriate U.S. federal officials promptly.

63. Germany's decision to file as it did resulted in the Court setting aside some fundamental aspects of judicial procedure. Previously, the Court articulated and operated on the twin principles of "equality of the Parties"[68] and of giving each party sufficient opportunity to be heard. In the circumstances following Germany's last-minute filing, neither principle could be observed.

64. In its advisory opinion concerning the *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*,[69] the Court identified both

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[68] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 337, para. 21.

[69] *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 166.

of these principles as necessary to avoid a "failure of justice." The Court stressed

> the fundamental right of a staff member to present his case, either orally or in writing, and to have it considered by the Tribunal before it determines his rights. An error in procedure is fundamental and constitutes "a failure of justice" when it is of such a kind as to violate the official's right to a fair hearing as above defined and in that sense to deprive him of justice.[70]

The Court continued:

> [C]ertain elements of the right to a fair hearing are well recognized and provide criteria helpful in identifying fundamental errors in procedure which have occasioned a failure of justice: for instance, … the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent's case; [and] the right to equality in the proceedings … .[71]

65. The Court affirmed these principles in its 1982 Advisory Opinion on *Judgement No. 273 of the United Nations Administrative Tribunal*.[72] The Court again emphasized the central importance both of treating the parties with

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[70] *Ibid.*, p. 209, para. 92.

[71] *Ibid.*

[72] *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 325.

equality and of ensuring to both the opportunity to present their views, recalling:

> the principle which, in its 1973 Advisory Opinion, it regarded as a requirement of the judicial process: the principle of equality of the parties. In that Opinion the Court emphasized various applications of the principle; it referred to it first with regard to the decision by the Committee "after an examination of the opposing views of the interested parties." (footnote omitted)[73]

66. Yet, because of Germany's decision to file its case at the last minute, these basic principles of the judicial process could not be observed in relation to the Court's 3 March Order. Germany would now compound this departure from precedent and sound practice by asking the Court to address a claim against the United States wholly predicated upon that Order. It is not appropriate for the Court to continue proceedings based on such a claim. The Court should find it inadmissible.

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[73] *Ibid.*, p. 338, para. 29.

PART IV

THE CLAIMED VIOLATIONS OF THE VIENNA CONVENTION

CHAPTER I

INTRODUCTION

67. As we have emphasized, the United States acknowledges and regrets that there was a violation of the U.S. obligation under Article 36(1)(b) promptly to inform Walter and Karl LaGrand that German consular officials could be notified of their arrest and detention. Accordingly, the United States does not contest Germany's claim that there was a breach of that provision. The United States has already extended an apology for this breach, and has taken and continues to take extensive steps to prevent any recurrence. However, the United States contests the legal validity of Germany's *other* claims related to the failure of consular notification.

CHAPTER II

GERMANY'S CLAIMS OF OTHER VIOLATIONS OF ARTICLE 36

68. Germany claims that the failure to inform the LaGrand brothers of their right to have Germany's Consulate General notified of their arrest and detention -- a failure that unquestionably contravened Article 36(1)(b) -- also violated several other provisions of the Vienna Convention.[74] The Memorial claims that the United States violated, *inter alia*:

-- Germany's right to communicate with its nationals under Article 36 (1)(a);

-- The second sentence of Article 36(1)(a), with regard to the rights of detained persons to communicate with consular officers; and

-- Germany's right to visit and assist detained nationals under Article 36 (1)(c).

69. In each case, however, it is clear that the underlying conduct complained of is the same -- the failure to inform the LaGrand brothers as required by Article 36(1)(b). There is no other basis for contending that German consular officers could not have communicated freely

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[74] Memorial, paras. 4.15, 4.16, and 7.02.

with the LaGrands, that the LaGrands could not have communicated freely with those officers, or that German consular officers were not free to visit and assist the LaGrands at all times after their arrest. Germany's complaint is simply that the LaGrands were not given information that might have prompted them to take steps to initiate such communications and visits.

70. Germany's claims under Articles 36(1)(a) and (c) seem particularly misplaced, given that German consular officials and the LaGrands communicated freely after German consular officials learned of the LaGrands' case in 1992. At that time, they already were providing consular assistance to two other German nationals in the Arizona prison. Thus, it is clear that Germany's access to German nationals in Arizona's prisons, as such, was not impeded. Nor does Germany allege or offer any evidence that Arizona interfered in any way with the LaGrands' access to consular officials when they initially sought to communicate in 1992. Nor does the Memorial claim that Arizona thereafter impeded German consuls' access to the brothers after their German nationality was clarified and German consular officers began to visit them.

71. Indeed, German consular officers visited the LaGrands a number of times beginning in December 1992. Karl was visited at least eight times, and Walter somewhat less, having refused consular visits on at least two occasions.[75] There is no evidence that the frequency of German consular visits was in any way limited by Arizona. Nor is there any evidence that Arizona refused to forward correspondence between German consular officers and the LaGrand brothers. In fact, the LaGrands at all times were free to communicate with German consular officials.

72. In addition, each of these additional claims again rests upon unverifiable factual assumptions about what might have happened. Each assumes that, had the LaGrand brothers been told in 1982 that the Los Angeles German Consulate General could be notified of their arrest, they would have requested such notification and that vigorous and effective consular assistance inevitably would have followed. As discussed in Part II, this is speculation, not proof. It is an insufficient foundation for Germany's string of additional claims.

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[75] U.S. Exhibit 1, p. 9.

CHAPTER III

GERMANY'S CLAIM OF INTERFERENCE WITH RIGHTS OF DIPLOMATIC PROTECTION IS OUTSIDE THE COURT'S JURISDICTION AND DEFECTIVE ON THE MERITS

73. Germany also claims that, because the LaGrand brothers were not informed of the possibility of consular notification, Germany suffered additional legal injury by being denied its right to provide diplomatic protection in respect of individual legal injuries suffered by the brothers.[76] This claim is linked with an extensive legal argument to the effect that consular notification under Article 36 is an individual right that must be enforceable in the criminal justice system.[77]

74. Like Germany's "add-on" claims of consequential violations of additional parts of Article 36 stemming from the failure to inform the LaGrands as required under Article 36(1)(b), it is not apparent what this additional claim contributes to the case. The United States acknowledges and regrets that there was a failure to inform the LaGrand brothers that they could request consular notification. Germany's objective seems to be to wrap that

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[76] Memorial, paras. 4.86 et seq.

[77] This issue is addressed in Part V.

failing in as many overlapping characterizations of consequential illegality as possible. This does not add either to the dignity or the clarity of these proceedings, and does not assist either the Parties or the Court.

75. In any case, to the extent that this claim by Germany is based on the general law of diplomatic protection, it is not within the Court's jurisdiction. The claim does not concern the interpretation or application of the Vienna Convention, and accordingly is not within the jurisdiction of the Court based on the Optional Protocol to the Vienna Convention.

PART V

THE ISSUE OF PROCEDURAL DEFAULT

76. Germany makes the additional argument that the United States violated the Vienna Convention by applying a rule of "procedural default" to the LaGrands' claims in U.S. criminal proceedings based on the violation of Article 31(1)(b). Procedural default rules as applied in the United States generally mean that U.S. domestic courts will not consider claims that have not been raised before the first court capable of adjudicating them. Germany argues that such rules cannot be applied to claims of violations of Article 36 of the Vienna Convention, principally on the ground that the proviso of Article 36(2) requires that violations of the consular notification requirements of Article 36(1) be remedied through the criminal justice systems of States party.[78] Germany also contends that Article 36 itself establishes an individual right, and that the existence and violation of this individual right requires a remedy in the criminal justice process.[79] The

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[78] Memorial, paras. 4.17 *et seq.*

[79] Memorial, paras. 4.86 *et seq.* Germany also relies upon its argument that Article 36 creates individual rights to support its "diplomatic protection" argument. Germany appears to be saying that, to the extent that Article 36 creates individual rights as opposed to governmental rights, the LaGrand brothers satisfied the general requirement of

first of these arguments is plainly wrong. To the extent that the second differs from the first (which for us is a matter of some ambiguity), Germany's arguments do not in any way compel the conclusion that Article 36 requires the establishment of remedies for individual criminal defendants in the criminal justice process. In particular, they do not require the invalidation of convictions or sentences.

77. The heart of Germany's position is the belief that the Vienna Convention requires the United States and presumably all other Parties to the Convention to amend their internal law to ensure the "reversal of judgments … infected by a lack of consular advice."[80] This sweeping argument rests on a fundamentally incorrect view of what the Vienna Convention requires. Germany's position goes far beyond the wording of the Convention, the intentions of the parties when it was negotiated, and the practice of States, including Germany's practice. The Vienna Convention does not require States Party to create a

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international law that they exhaust their domestic remedies (*i.e.*, the remedies available to them in the United States) and that it therefore is appropriate under international law for Germany now to espouse those claims. As we explain in Part IV, however, any claim brought under a general theory of diplomatic protection is outside the Court's jurisdiction.

[80] Memorial, para. 4.18.

national law remedy permitting individuals to assert claims involving the Convention in criminal proceedings. If there is no such requirement, it cannot violate the Convention to require that efforts to assert such claims be presented to the first court capable of adjudicating them.

CHAPTER I

THE PROVISO OF ARTICLE 36(2) DOES NOT REQUIRE REMEDIES IN THE CRIMINAL JUSTICE PROCESS

78. Germany's argument rests principally on a novel reading of Article 36(2), which contains a proviso that the laws and regulations of States Party must "enable full effect to be given to the purposes for which the rights accorded under this article are intended." Germany would read this proviso as a broad prohibition on any domestic law rule that prevents raising at any stage in a criminal appeal a claimed violation of the obligation to inform a foreign national defendant that his consular officials may, if he wishes, be notified of his arrest.[81] The proviso of Article 36(2) cannot be given such an artificial scope.

79. The proviso must first be read in context, in light of the immediately preceding language and of the overall structure and focus of Article 36. Article 36(2) provides as follows:

> 2. The rights referred to in paragraph 1 of this Article [of consular officers and their nationals to communicate, the rights of nationals to have consular officials notified of an arrest or detention, and the rights of consular officers to visit detainees and provide consular assistance] shall be exercised in conformity with the

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[81] Memorial, paras. 4.17 *et seq.*

> laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

In the context of a foreign national in detention, the relevant laws and regulations contemplated by Article 36(2) are those that may affect the exercise of specific rights under Article 36(1), such as those addressing the timing of communications, visiting hours, and security in a detention facility. There is no suggestion in the text of Article 36(2) that the rules of criminal law and procedure under which a defendant would be tried or have his conviction and sentence reviewed by appellate courts are also within the scope of this provision.

80. The *travaux* also make the narrow focus of Article 36(2) clear. The International Law Commission's ("ILC") original proposal for Article 36 included a similar provision, which the ILC explained in terms that focused on the mechanics of prison visits:

> Thus, visits to persons in custody or imprisoned are permissible in conformity with provisions of the code of criminal procedure and prison regulations. As a general rule, ... codes of criminal procedure require the permission of the examining magistrate, who will decide in light of the requirements of the investigation. In

> such a case, the consular official must apply to the examining magistrate for permission. In the case of a person imprisoned in pursuance of a judgement, the prison regulations governing visits to inmates apply also to any visits which the consular official may wish to make to a prisoner who is a national of the sending State.[82]

This emphasis on prison visitation rules continued in the meetings of the Second Committee of the United Nations Conference on Consular Relations as it considered Article 36(2).[83] For example, the delegate from the United Kingdom, in arguing that the ILC's proviso gave too much scope to national regulations, focused specifically on regulations pertaining to prison visits and the delivery of items to prisoners.[84] The concern of this and other delegates who pushed, ultimately successfully, for modification of the ILC's proviso was that restrictions on consular visits not be so severe that such visits could not be effective. There is no suggestion whatever that any State Party thought that the proviso in Article 36(2) in any way required remedies in the criminal justice process for failures to inform detained foreign nationals that they could request consular assistance, or that the proviso would prevent States Party from applying equally to foreign nationals and to their own nationals rules requiring the orderly and timely assertion of defenses in criminal cases.

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[82] United Nations Conference on Consular Relations, Vol. II, A/CONF.25/16/Add.1, Annexes, Doc. A/CONF.25/6, Draft articles on consular relations adopted by the International Law Commission at its thirteenth session, p. 24. Article 36(2) as proposed by the ILC provided that the rights set forth in Article 36(1) "shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must not nullify these rights." *Ibid.*

[83] Article 36(2) was discussed specifically at the 18th and 19th meetings of the Second Committee on March 18, 1963. United Nations Conference on Consular Relations, Vol. I, Summary records of plenary meetings and of the First and Second Committees, A/CONF.25/16, pp. 346-48.

[84] The representative of the United Kingdom indicated that, "It was realized that consulates must comply with laws and regulations on such matters as prison visiting and what might be given to the prisoner. It was of the greatest importance, however, that the substance of the rights and obligations in paragraph 1 must be observed." United Nations Conference on Consular Relations, Vol. I, Summary records of plenary meetings and of the First and Second Committees, A/CONF.25/16, pp. 346-47.

81. During the plenary session, statements by other delegates directly raised the question of the relationship between State criminal laws and the proviso. The delegates from the Union of Soviet Socialist Republics and Belarus strongly preferred the ILC version of the proviso over the alternative ultimately adopted. In describing their concerns about how the proviso balanced the laws of the receiving State with the rights of consular officials, the delegate from the Union of Soviet Socialist Republics stressed that

> the matters dealt with in Article 36 were connected with the criminal law and procedure of the receiving State,

> which were outside the scope for the codification of consular law.[85]

The delegate from Belarus spoke in similar terms:

> the Conference was drafting a consular convention, not an international penal code, and it had no right to attempt to dictate the penal codes of sovereign States.[86]

While these statements were made in support of the ILC proposal which was not adopted, they nevertheless reflect a publicly stated understanding of the negotiators with respect to the implications of the requirements they were addressing. They are perhaps the most direct references made during the negotiating session to the criminal justice systems of receiving States. Thus, it is significant that neither these statements nor any others elicited any responsive statement expressing the expectation that criminal proceedings would be held in abeyance for consular notification to be completed, or that the results of a criminal justice process would be subject to challenge if notification inadvertently was not given. Thus, the negotiating history does not support Germany's broad reading of the proviso to Article 36(2).

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[85] *Ibid.*, p. 40, para. 3.

[86] *Ibid.*, p. 40, para. 8.

CHAPTER II

ARTICLE 36 AS A WHOLE ALSO DOES NOT SUPPORT GERMANY'S CLAIM

82. The text and negotiating history of Article 36(1) also do not support Germany's claim that failure of consular notification requires individual remedies in the criminal justice system. Indeed, all indications in the text and negotiating history suggest that States Party would regard such a reading as a significant alteration of what they agreed to in the Vienna Convention.

Section I. The Text of Article 36(1) Does Not Require a Remedy in the Criminal Justice Process

83. Article 36(1) has three subparts that were painstakingly negotiated by the United Nations Conference on Consular Relations in a series of difficult sessions of the Second Committee and the Plenary Session.[87] The initial vote to adopt Article 36 in the Plenary Session failed, and the article was reconsidered and adopted only after the last-minute addition of the final sentence of Article

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[87] The Second Committee considered Article 36, focusing primarily on Article 36(1), on March 14, 15, and 18, 1963. United Nations Conference on Consular Relations, Vol. I, Summary records of plenary meetings and of the First and Second Committees, A/CONF.25/16, pp. 331-348. The Plenary Session then took up Article 36 on April 17, 1963, when a vote to adopt it failed, and again on April 20, 1963. *Ibid*, pp. 35-46 and 81-87, respectively. For a review of the negotiating history, *see* L. Lee, *Consular Law and Practice* (1991), pp. 133-151.

36(1)(b), which was proposed as a compromise by the United Kingdom.[88] As a result of this compromise, Article 36(1)(b) reflects two separate notification obligations: the obligation to notify consular officials if the detainee so requests, and the further obligation, stated in the final compromise sentence, to inform the detained foreign national of the option to have consular officials notified. As previously shown in Part IV, this case properly relates only to the obligation to inform the foreign national of the option to have consular officials notified of the detention.[89]

84. Significantly, nothing in Article 36 relates these notification obligations to the criminal justice process. Article 36 provides that both notification obligations must be carried out "without delay," but does not define this term or relate it to any particular event in the criminal justice process.[90] Nor does Article 36

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[88] Document A/CONF.25/L/50, United Nations Conference on Consular Relations, Vol. II, A/CONF.25/16/Add.1, p. 171.

[89] Also as shown in Part IV, while Germany seeks to implicate other aspects of Article 36, it has not identified any failure by Arizona to honor a request from either Walter or Karl LaGrand to notify the relevant consular post, or to allow consular contact or access once requested.

[90] When States have wished to define a precise time by which the consular notification procedure must be completed, they have done so by concluding agreements separate from the Vienna Convention. For example, the United States and a number of other States have negotiated

specify the *manner* in which consular officials must be notified, leaving it open to States party to use a variety of methods, including ones that result in notification occurring after critical events in a criminal investigation have occurred.[91]

85. Article 36 also does not establish a role for the consular officer in the foreign national's defense in criminal proceedings. Thus, while Article 36(1)(c) establishes that consular officials must be permitted to visit detained nationals, to converse and correspond with them, and to arrange for their legal representation, detained persons need not accept such assistance. A consular officer must refrain from taking any action on behalf of a detainee that the detainee opposes.[92]

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bilateral consular agreements that provide enhanced consular protections beyond those contained in the Convention. In some of these agreements, the parties have allowed each other up to four days to provide consular notification following a detention or arrest. Even these agreements, however, do not tie consular notification to any particular stage of an investigation or prosecution. *See* U.S. Department of State, *Consular Notification and Access* (January 1998), pp. 47-49 (summarizing bilateral agreements between the United States and other countries).

[91] The Declaration of Edward Betancourt, U.S. Exhibit 8, describes a number of the ways in which consular notification is provided.

[92] A detainee may in fact reject consular assistance for a variety of reasons, including to protect his privacy, because of a general distrust of his own government, or because he considers it unnecessary (*e.g.*, in the case of a long-term, assimilated resident). *See ibid.*

86. Moreover, neither Article 36, nor any other provision in the Vienna Convention, obligates consular officials to provide any measure of substantive consular assistance in any criminal case, whatever the charges or the potential penalty. Article 36 provides for the *notification* of consular authorities at the request of a detained person, but does not confer on the detained individual a substantive right to compel consular assistance.

87. Thus, the language and structure of Article 36(1) do not support any claim that the receiving State must hold its criminal justice process in abeyance pending the provision of consular services. Because Article 36(1) does not link the justice process to consular notification, it cannot be read to require that receiving States provide remedies in the criminal justice process if Article 36(1) is not fully observed.

Section II. The Negotiating History of Article 36(1) Contradicts Germany's Claim

88. The negotiating history also conflicts with Germany's claim that Article 36 requires the creation of remedies as part of the criminal justice process. As noted earlier, the Vienna Convention was negotiated on the basis

of draft articles prepared by the International Law Commission. The relevant ILC proposals did not require authorities to inform arrested persons that their consul could be notified. This obligation was added at the Conference, where Article 36 was negotiated with great difficulty; final agreement came only two days before the Conference ended. Some delegations supported the ILC's initial draft of Article 36, which would have required that receiving States automatically notify sending States' consuls whenever a national was arrested. Many other States strongly opposed this. They argued, among other things, that this requirement would impose an excessive practical burden on the receiving State, particularly a receiving state with large numbers of immigrants, and that the national might not want his government authorities to know about his arrest.[93]

89. The debate on the ILC draft, on the numerous amendments offered to it, and on the final amendments that ultimately became Article 36(1) gives no indication that the negotiating States expected or intended failures of

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[93] United Nations Conference on Consular Relations, Vol. I, Summary records of plenary meetings and of the First and Second Committees, A/CONF.25/16, pp. 331-348 (Second Committee sessions of March 14, 15, and 18, 1963), pp. 35-46 (Plenary Session of April 17, 1963), pp. 81-87 (Plenary Session of April 20, 1963). *See* Lee, *supra* note 87, pp. 138-139.

consular notification to invalidate subsequent legal proceedings. Moreover, there was express discussion of the possibility that such failures would occur, particularly if notification was required in every case. For example, in offering an amendment to change the ILC's original proposal to state that the obligation to inform the sending State only arises *if the national so requests,* the delegate of Egypt explained his amendment as follows:

> The purpose of the amendment is to lessen the burden on the authorities of receiving States, especially those which had large numbers of resident aliens or which received many tourists and visitors. *The language proposed in the joint amendment would ensure that the authorities of the receiving State would not be blamed if, owing to the pressure of work or other circumstances, there was a failure to report the arrest of a national of the sending State.*[94]

90. These and other statements in support of requiring notification only when requested by the detainee, as was ultimately agreed, show that the Conference recognized that Article 36 presented practical problems of compliance that would be addressed through the normal

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[94] United Nations Conference on Consular Relations, Vol. I, Summary records of plenary meetings and of the First and Second Committees, A/CONF.25/16, p. 82 (Plenary Session of April 20, 1963). (Emphasis added.)

processes of diplomatic adjustment.[95] Had the parties thought failures of consular notification would require or result in the invalidation of subsequent criminal proceedings, the many States that expressed fears about the burden of the notification requirement would surely have rejected the text now before the Court. Thus, the negotiating history of Article 36 does not support Germany's broad view of the consequences of non-compliance with Article 36.

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[95] At an earlier stage of the debate, for example, the United Kingdom suggested that concerns about compliance could be addressed through bilateral agreements to waive rights where mutually convenient. United Nations Conference on Consular Relations, Vol. I, Summary records of plenary meetings and of the First and Second Committees, A/CONF.25/16, p. 340, para. 21 (Second Committee session of March 15, 1963). Other delegations implied that technical violations in cases of brief arrests might be overlooked. *E.g., ibid.*, p. 338, para. 10 (delegate from Yugoslavia), p. 341, para. 37 (delegate from France).

CHAPTER III

STATE PRACTICE, INCLUDING GERMANY'S OWN PRACTICE, CONFLICTS WITH GERMANY'S CLAIM

91. State practice, which is particularly instructive for such a widely accepted Convention, also conflicts with Germany's claim. The U.S. Department of State has conducted an extensive survey of State practice under the Vienna Convention in response to past expressions of concern regarding U.S. consular notification practices, and has continued to monitor State practice under the Convention carefully. These efforts are described in the Declaration of a senior State Department consular official, Edward Betancourt, on State practice regarding consular notification and access at U.S. Exhibit 8. As indicated in that declaration, States Party to the Vienna Convention throughout the world operate on the understanding that a criminal proceeding against a foreign national can proceed regardless of whether consular notification or assistance is provided.[96]

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[96] Germany suggests that a different rule is emerging in the United States. (Memorial, paras. 4.116-4.119.) In fact, the current trend is the opposite. The 9th Circuit Court of Appeals decision described in paragraph 4.118 of the Memorial has been withdrawn, and both the 9th and the 1st Circuit Courts have adopted a rule that failures of consular notification are not appropriately remedied by suppressing evidence or other similar measures in the criminal process. *United States v. Nai Fook Li*, 2000 WL 217891 (1st Cir., February 29, 2000); *United States v.*

92. Indeed, Germany's Memorial does not claim that German courts would invalidate a conviction or sentence when there has been a failure of consular notification. We question whether Germany (or very many other Parties to the Convention) could make such a representation. Germany's claim in this case that the Vienna Convention requires individual remedies in the criminal justice system, including the invalidation of convictions, fundamentally conflicts with the manner in which States, including Germany, actually implement the Convention.

93. As Mr. Betancourt describes, violations of Article 36 are common and States characteristically deal with violations of consular notification obligations through diplomatic means, not through judicial setting aside of convictions. When a consular officer learns of a failure of notification, a diplomatic communication often is sent to protest the failure. Most States accept responsibility to investigate alleged violations and, if necessary, to remind the appropriate "competent authorities" of their responsibilities. If notification procedures are not followed, it is also common for the host government to

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Lombera-Camorlinga, 2000 WL 245374 (9th Cir., March 6, 2000). These decisions are provided to the Court as U.S. Exhibit 9.

apologize and to undertake to ensure improved future compliance.

94. This has been precisely the practice followed by Germany. For example, less than a month after Germany commenced this suit, the German Foreign Ministry sent the United States Embassy a note responding to the Embassy's complaint about a failure of consular notification in the case of a U.S. citizen arrested in Germany on August 26, 1997, and convicted on December 16, 1997.[97] The Ministry's note is accompanied by a letter from the Senator for Justice and Constitutional Matters of Bremen, acknowledging the requirements of Article 36 and reporting the results of the official investigation into the failure to notify U.S. consular officers. The letter acknowledges that the U.S. citizen may not have been informed of his right to request notification, that the citizen apparently requested notification nonetheless, but that the competent authorities -- in this case, prison officials -- forgot to notify U.S. consular officials as requested. The letter apologizes for the error and advises of the steps taken to avoid repetition. Neither the German note nor letter suggests that the conviction would in any way be affected

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[97] U.S. Exhibit 10.

by the breach of Article 36. German officials similarly investigated and apologized in another case involving a protracted failure of notification in 1998.[98]

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[98] U.S. Exhibit 11.

CHAPTER IV

EVEN IF ARTICLE 36 IN SOME SENSE ESTABLISHES INDIVIDUAL RIGHTS, THERE IS NO REQUIREMENT THAT THOSE RIGHTS BE JUSTICIABLE IN NATIONAL CRIMINAL JUSTICE SYSTEMS

95. Germany also argues at length that Article 36 establishes an individual right.[99] This argument serves as the predicate for Germany's claim that the failure to inform the LaGrands, as required by Article 36(1)(b), violated Germany's customary law right to exercise diplomatic protection of its nationals.[100] Germany also appears to suggest, however, that a violation of Article 36 must be remedied in national criminal justice systems because individual rights are at issue.

96. As shown above, however, the Vienna Convention does not require States Party to remedy violations of Article 36 through their criminal justice systems. This conclusion does not turn on whether Article 36 in some sense incorporates or confers individual rights.[101]

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[99] Memorial, para. 4.86 *et seq.*

[100] As noted in Part IV, this claim is outside the Court's jurisdiction under the Optional Protocol in that it is predicated upon customary law, and not the Vienna Convention.

[101] The two U.S. appeals courts that have recently considered this issue (*see supra* note 96, and U.S. Exhibit 9) concluded that it is not necessary to address whether Article 36 in some sense creates individual rights, because Article 36 in any event does not require the

97. The rights of consular notification and access under the Vienna Convention in any event are rights of States, not individuals. Clearly they can benefit individuals by permitting -- not requiring -- States to offer them consular assistance, but the Convention's role is not to articulate or confer individual rights. Rather, the Convention establishes a set of legal rules regulating consular relations between States, including such matters as the establishment of consular relations, the appointment of consular staff, and various exemptions from host State regulation. The Preamble emphasizes the inter-State character of this system.[102]

98. In the limited areas where the Convention addresses relationships between States and individuals, it does so to facilitate the performance of consular functions by States. Article 36 thus is entitled "Communication and contact with nationals of the sending State," and emphasizes the ability of consular officers to communicate

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suppression of evidence or other remedies in the criminal justice system.

[102] The Preamble affirms that the Convention would "contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems." In the same vein, the Preamble declares that the purpose of privileges and immunities under the Convention "is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States ... ."

with their nationals. Indeed, Article 36 is located in a section of the Convention pertaining expressly to the "Facilities, Privileges And Immunities Relating To A Consular Post".

99. In two phrases, indisputably, Article 36 does express ideas in the vocabulary of "rights". This vocabulary implements the compromise described above between those countries that advocated notification to consular officials of all detentions and those who sought notification only when specifically requested by the detainee. Had mandatory notification been adopted, Article 36 would not have referred to the situation of the individual at all, and notification to consular officials would have occurred regardless of the individual's wishes.[103]

100. There was considerable discussion among the drafters of the Vienna Convention about the appropriateness of referring at all to individual rights, focusing

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[103] The original ILC proposal read as follows: "The competent authorities shall, without undue delay, inform the competent consulate of the sending State if, within its district, a national of that State is committed to prison or to custody pending trial or is detained in any other manner." This proposal did not reference the rights of individuals, and the commentary to it made clear that it was the ability of consular officials to perform their functions that was at issue. Document A/CONF.25/6, United Nations Conference on Consular Relations, Vol. II, A/CONF.25/16/Add.1, p. 24.

particularly on how Article 36(1)(a) should address the ability of the foreign national to communicate with a consular official. As Germany has reviewed in its Memorial,[104] a number of delegates expressed the view that the Convention should recognize the individual right of a foreign national to communicate with his or her consular officials, but this was a matter of great controversy and no clear consensus emerged. At a point during the negotiating sessions, when Article 36(1)(a) referred to the right of the national to communicate with a consul and to the right of a consul to communicate with a national, a delegate from Venezuela objected to any reference to an individual right. He noted that the Conference was charged with negotiating a convention on consular relations, and that it was inappropriate for the convention to speak of individual rights.[105] The subsequent discussion elicited numerous perspectives, including the observation that consular communications inherently involve the State, on the one hand, and the individual, on the other.[106] It also resulted in a reversal of the order of Article 36(1)(a), so that it came to refer first to the right of the consul to communicate with the individual, and second to the right of the individual to communication with the consul.[107] That reversal underscores the fundamental point, that the position of the individual under the Convention derives from the right of the State party to the Convention, acting through its consular officer, to communicate with its nationals. The treatment due to individuals is inextricably linked to and derived from the right of the State. Indeed, during the negotiations, the United Kingdom argued that the burden of a provision requiring notification in all cases could be managed by States waiving their rights under the convention.[108] This proposal surely would not have been made if the delegates had thought they were creating rights of individuals independent of the rights of States.

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[104] Memorial, paras. 4.97-4.107.

[105] United Nations Conference on Consular Relations, Vol. I, Summary records of plenary meetings and of the First and Second Committees, A/CONF.25/16, p. 331, para. 32 (Second Committee session of March 14, 1963).

[106] *Ibid.*, p. 333, para. 50 (observations of India).

101. While the exact nature of the position of individuals under the Convention does not lend itself to easy characterization, the relevant question here is only whether the Vienna Convention requires States party to

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[107] *Ibid.*, p. 334, para. 2 (amendment offered by Venezuela and others).

accord individual foreign nationals judicially enforceable remedies in their criminal justice systems. The text of Article 36, its negotiating history, and the practice of other States Party to the Convention all indicate that it does not.

102. In contrast, Germany's sweeping view, if accepted, could have broad repercussions not only for this case, but also for each of the 163 parties to the Convention. To our knowledge, adoption of this expansive view is being advocated primarily, if not solely, in the United States, where two appellate courts have recently rejected it.[109] So far as we are aware, in no other country, including Germany, is serious consideration being given to providing the kind of expansive remedy under the Vienna Convention advocated by Germany.[110] The Court should

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[108] *Ibid.*, p. 340, para. 21 (Second Committee session of March 15, 1963).

[109] *See supra* notes 96 and 101 and U.S. Exhibit 9.

[110] Insofar as the United States knows, this remains true with respect to those States Party to the American Convention on Human Rights ("Pact of San Jose"), 1114 UNTS 123, opened for signature November 22, 1969; entered into force July 18, 1978. (The United States is not a Party.) This is of particular interest because, in an advisory opinion released October 1, 1999, following a request by Mexico and supported by several parties to the Convention (Advisory Opinion OC-16/99), the Inter-American Court reached conclusions that could well have prompted those States to change their practices, if they agreed that consular notification is an integral part of the criminal justice process.

The Inter-American Court of Human Rights is established by the American Convention, which in Article 64 permits the Court to provide non-binding advisory opinions "regarding the interpretation of [the not read into a clear and nearly universal multilateral instrument such a substantial and potentially disruptive additional obligation unsupported by the text and far beyond the understandings and practice of the States party. There are few situations in which States actually have agreed by treaty that the failure to observe specific standards can be the basis for appeal to an international tribunal for possible reversal of a conviction or sentence. Where States have elected to create such mechanisms, they have done so expressly and with great precision.[111] They have not created such additional remedies indirectly or

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American Convention] or of other treaties concerning the protection of human rights in the American states." Mexico asked the Court to render an advisory opinion with respect to the nature of the obligations of Article 36 of the Vienna Convention on Consular Relations and the remedies that should be provided in the case of violations. Among the Inter-American Court's non-binding conclusions are that foreign nationals must be informed that they may request consular assistance before any statement is taken from them, and that capital punishment may not be carried out in any case where consular notification was not provided. The United States has reservations regarding these and some of the Court's other advisory conclusions, for reasons suggested by this Counter-Memorial. However, to our knowledge neither Mexico nor any other State Party to the American Convention has sought to apply the Court's advice to its procedures for interrogating defendants or has vacated or altered sentences in criminal proceedings because of failures of consular notification.

[111] Examples include regional instruments and institutions such as the European Convention on Human Rights, which provides for the Strasbourg Court, and the American Convention on Human Rights, which provides for the Inter-American Court of Human Rights. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 221, signed November 4, 1950; entered into force September 3, 1953; *American Convention on Human Rights*, *supra* note 110.

implicitly, as Germany wrongly suggests was done through Article 36.

103. Accordingly, the proviso to Article 36(2) does not require that States authorize individuals to attack their criminal convictions and sentences through individual criminal proceedings. Neither does the text of Article 36 overall require such remedies, regardless of whether it in some sense recognizes rights of individuals. If there is no obligation under the Convention to create such individual remedies in criminal proceedings, the rule of procedural default -- requiring that claims seeking such remedies be asserted at an appropriately early stage -- cannot violate the Convention.

PART VI

THE COURT'S ORDER OF 3 MARCH 1999

104. Part III of the Counter-Memorial showed why the claims involved in Germany's second, third, and fourth submissions are inadmissible. However, should the Court find Germany's claims to be admissible, this Part shows that the United States has not violated any international legal obligations related to the Court's 3 March 1999 Order indicating provisional measures. Chapter I reviews the circumstances of the Court's Order. Chapter II shows that the United States acted in conformity with the Order. Chapter III examines the language of the Order, and shows that, by its terms, it did not create binding legal obligations. Accordingly, the Court can resolve this claim by Germany on the bases set out in these three sections, and need not confront the difficult and controversial general question of the status of its indications of provisional measures under international law. Should the Court feel it necessary to address the question, however, the fourth Chapter analyzes the effect of the Court's Order under relevant provisions of the Court's Statute and the Charter of the United Nations. It shows that the Order did not give rise to international legal obligations that were violated by the United States.

CHAPTER I

THE CIRCUMSTANCES OF THE COURT'S ORDER AND ACTIONS TAKEN IN RESPONSE

Section I. Germany's Filing and the Court's Order

105. Germany chose to file its Application and Request for the Indication of Provisional Measures after the close of business at 19:30[112] in The Hague on the evening of 2 March, approximately 27½ hours before the time set for the execution of Walter LaGrand. The Registrar presumably informed the Members of the Court of the filing, and steps were taken by the President of the Bench to ascertain judges' views on procedure and substance.

106. Also that evening, the Registrar transmitted a copy of Germany's Application and Request for the Indication of Provisional Measures to the United States Embassy in The Hague by facsimile machine. The copy received at the Embassy is time-stamped "2 Mar. 1999 21:48 INTERNATIONAL COURT OF JUSTICE". The text was relayed to the Department of State in Washington and was received there late in the afternoon of 2 March, sometime after 22:00 The Hague time/ 16:00 Washington time. The

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[112] At all relevant times, the local time in The Hague was six hours ahead of the time in Washington, D.C., and eight hours ahead of the time in Arizona.

Application and Request for Provisional Measures were then promptly transmitted by facsimile to the legal staff of the Governor of Arizona.

107. In an unprecedented move, the Court then acted without giving the United States an opportunity before the Order was issued to present its views regarding the merits of Germany's request for provisional measures. In this regard, a representative from the United States Embassy in The Hague was invited by the Vice-President to a meeting also attended by Germany's Agent on the morning of 3 March. That meeting did not provide an opportunity for substantive discussion. The views expressed by the U.S. representative were summarized in the Court's Order of 3 March:

> Whereas, on 3 March 1999, at 9:00 (The Hague time), the Vice-President of the Court received the representatives of the Parties ... ; whereas ... , referring to the provisions of Article 75 of the Rules of Court, [the representative of the German Government] asked the Court to indicate forthwith, and without holding any hearing, provisional measures *proprio motu;* and whereas the representative of the United States pointed out that the case had been the subject of lengthy proceedings in the United States, that the request for provisional measures submitted by Germany was made at a very late date and that the United States would have strong objections to any procedure such as that proposed only that very morning by the representative of Germany which would result in the Court making an Order

> *proprio motu* without having first duly heard the two Parties.[113]

Under the circumstances, a hurried meeting like that described in the Court's Order simply is not an appropriate or sufficient opportunity for the United States or any other respondent in a case in this Court to present its defense.

108. In explanation of the decision to act without a hearing, paragraph 21 of the Court's Order indicates that the Court was acting -- for the first time -- pursuant to Article 75(1) of the Rules of Court. Article 75(1) provides that:

> The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties.

However, it seems clear that the Court was not acting on its own initiative such that the authority of Article 75(1) provided an appropriate basis for action. The terms of the Court's Order quote Germany's Application, the Request for the Indication of Provisional Measures, and even Germany's oral representations at length. The terms of the Order make clear that Germany's requests, and not the Court's own initiative, were the predicate for the 3 March Order.

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[113] Order of 3 March 1999, p. 13, para.12.

109. Under Article 74 of the Rules of Court, any request for the indication of provisional measures triggers the requirement that the Court arrange "a hearing which will afford the parties an opportunity of being represented at it." In an earlier case under what would seem to be more compelling circumstances, the Court declined to exercise its authority under Article 75 following a request for provisional measures. The Court recalled this decision in its Second Order in the *Bosnia Genocide* case:

> Whereas by a letter of 11 August 1993 in response to the letter of 4 August 1993 from the Agent of Bosnia-Herzegovina ..., the Registrar ... reiterated the view of the Court ... that the Court did not consider that the question arose of the exercise of its powers under Article 75, paragraph 1, of the Rules of Court
>
> > "where, as in the present case specific requests for the indication of provisional measures ... have been made by each of the Parties",
>
> and that, in its view,
>
> > "those powers do not in any event extend to indicating measures without affording both Parties the opportunity of being heard."[114]

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[114] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 334, para. 13.

110. The Court's Order granting Germany's request for provisional measures was read at a sitting the following evening, 3 March, beginning at 19:15 The Hague Time/13:15 Washington time. This was less than 24 hours after Germany filed its case and just under four hours before the time set for the execution of Walter LaGrand.[115] Following the reading, a United States Embassy official in The Hague immediately telephoned the Office of the Legal Adviser at the Department of State in Washington, D.C. and reported the substance of the Order. The text was also transmitted to Washington by telefax, where it was received at about 14:30 Washington time.

111. Thus, the Court's Order arrived in Washington about two-and-a-half hours before the time set for Walter LaGrand's execution. As indicated by the Order, the Acting Legal Adviser of the Department of State promptly transmitted the Order to the Governor of the State of Arizona by facsimile. The Legal Adviser (who was traveling in Thailand with the Secretary of State) was awakened and informed of the Order's contents by telephone.

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[115] International Court of Justice Press Communiqué 99/8. ("This evening, at 7 p.m., the International Court of Justice (ICJ) will give

Section II. Germany's Case in the U.S. Supreme Court

112. At about the time this Court's Order was received in Washington on the afternoon of 3 March, Germany filed a separate case in the Supreme Court of the United States. Germany's filing included a motion for leave to file a bill of complaint and a motion for a preliminary injunction to prevent the execution of Walter LaGrand.[116] This filing, along with two other simultaneous actions involving Walter LaGrand which reached the Supreme Court that day,[117] brought the matter to the sole federal organ that constitutionally might have had power to halt the execution of Mr. LaGrand. At approximately 4:25 PM,[118] the Clerk of the Supreme Court wrote the Solicitor General of the United States and urgently requested the Solicitor General's views regarding Germany's action in the Supreme Court. (The Solicitor General is the fourth-ranking official of the Department of Justice and represents the United States before the Supreme Court.)

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its decision on the request for the indication of provisional measures made by Germany ... .")

[116] Memorial, Annex MG 27, p. 615.

[117] *See* Memorial, para. 2.15; Memorial, Annex MG 30, p. 665; Memorial, Annex MG 31, p. 669.

[118] Letter of U.S. Solicitor General to the U.S. Supreme Court (3 March 1999), Memorial, Annex MG 28, p. 655.

113. The Solicitor General then had a very short time in which to answer. He responded that, based on a limited understanding of Germany's claim and the related circumstances, the United States did not believe that either the Vienna Convention or the Court's Order provided a sufficient basis for the United States Supreme Court to grant a stay.[119]

114. This statement of views was not intended to be disrespectful of the International Court of Justice. Rather, the Solicitor General sought to convey to the Supreme Court the United States understanding of the legal situation, which in turn reflected the reality -- previously acknowledged by Germany's President and Justice Minister[120] -- that under the United States constitutional system, the conviction and execution of Walter LaGrand was a matter within the authority of the State of Arizona.

115. The Supreme Court of the United States denied Germany's motion for leave to file the bill of complaint as well as its motion for a preliminary injunction to stay the execution of Walter LaGrand. In a short opinion, the Supreme Court cited the large number of likely

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[119] *Ibid.*

[120] Memorial, Annex MG 14, p. 507 and Annex MG 20, p. 537.

jurisdictional obstacles to hearing the case, as well as the "tardiness of the pleas" put forward by Germany.[121]

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[121] For example, the Supreme Court expressed concern that the United States had not waived its sovereign immunity and noted that it was "doubtful" that Article III of the U.S. Constitution would provide "an anchor for an action to prevent execution of a German citizen who is not an ambassador or consul." With respect to the action against the State of Arizona, the Court stated that "a foreign government's ability here to assert a claim against a State is without evident support in the Vienna Convention and in probable contravention of Eleventh Amendment principles." *Germany v. United States*, 119 S.Ct. 1016 (1999); Memorial, Annex MG 32, p. 677. The Eleventh Amendment of the U.S. Constitution states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State."

CHAPTER II

THE UNITED STATES ACTED AS CALLED FOR BY THE COURT'S ORDER

116. This Chapter shows that the United States did what was called for by the Court's 3 March Order, given the extraordinary and unprecedented circumstances in which it was forced to act. The heart of the Court's indication of provisional measures consisted of two provisions. The authoritative English text states:

> (a) The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order;
>
> (b) The Government of the United States of America should transmit this Order to the Governor of the State of Arizona.[122]

117. First, as noted above, the United States promptly took the action called for in second paragraph of the Court's operative statement that: "The Government of the United States of America should transmit this Order to the Governor of the State of Arizona."

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[122] Order of 3 March 1999, p. 16 , para. 29.

118. The United States also complied with the Court's further request that "The United States of America should take all measures at *its disposal* to ensure that Walter LaGrand is not executed pending a final decision in these proceedings."[123] By immediately transmitting the Order to the Governor of Arizona, the United States placed the Order in the hands of the one official who, at that stage, might have had legal authority to stop the execution. Otherwise, the measures at the United States Government's disposal were exceedingly limited.

119. Two central factors constrained the United States ability to act. The first was the extraordinarily short time between issuance of the Court's Order and the time set for the execution of Walter LaGrand. There was enough time to transmit the Order to Arizona, but not to identify and take any further measures, which would have required review of complex and disputed factual and legal issues, as well as involvement of numerous high officials within the federal Executive branch and judiciary. While the adjudication of important matters in this Court often quite properly takes years of careful proceedings, the Court's Order in this case allowed about two hours for

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[123] Emphasis added.

response. Assessing the bases for further action -- not to mention undertaking required consultation with senior officials and effective coordination among them -- in such a short period of time simply was not possible.

120. In the *Breard* case, where the Court's Order indicating provisional measures provided somewhat more time for analysis and action, the Secretary of State wrote to the Governor of Virginia asking the Governor to stay the execution of Angel Francisco Breard.[124] Germany's Memorial suggests a similar step might have been an option in this case.[125] As explained above, however, the Court's 3 March Order did not allow time for consideration -- much less implementation -- of such an action in this case.

121. The second constraining factor was the character of the United States of America as a federal republic of divided powers. Under the constitutional order developed at a conference of state delegates in Philadelphia in 1787 and in force since 1789, the separate states of the United States retain their independence and authority except in the areas where the Federal Government has been allocated power by the Constitution of the United States. The

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[124] Memorial, Annex MG 37, p. 755.

separate states are not subsidiary bodies subordinate to the power of the Federal Government and subject to its direction. Rather, they remain sovereign and the masters of their affairs within the areas of responsibility reserved to them by the United States Constitution.[126]

122. One of the most important functions reserved to the states is criminal law enforcement, including the right to impose and administer capital punishment in serious cases prescribed by state law, provided it is done consistently with rights guaranteed by the Federal Constitution. Although Federal law establishes some Federal crimes, criminal law enforcement for crimes such as murder in the United States largely lies within the authority and responsibility of the states. Federal statutes give the Federal courts specified powers to review state criminal proceedings to ensure that those proceedings have complied with rights guaranteed by the United States Constitution. There is no general Federal power of review of state court criminal proceedings.

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[125] Memorial, para. 4.169

[126] *See* the Tenth Amendment of the United States Constitution, which states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." For a general discussion of the limits on Federal power under the United States Constitution, *see* L. Tribe, *American Constitutional Law* (1988), pp. 209-399.

123. Prior to the filing of this case, senior German officials regularly recognized these characteristics of the United States Federal system. In writing to President Clinton on 5 February, President Herzog acknowledged that:

> [Y]ou have no means at law to influence the decision ... of Ms. Jane Dee Hull, the Governor of Arizona.[127]

Similarly, in writing to the U.S. Attorney General, Germany's Federal Minister of Justice stated that:

> I am well aware that you do not have any legal avenues for influencing the decision on whether to grant clemency, since this decision has to be taken by the Governor of Arizona, Ms. Jane Dee Hull.[128]

124. The United States does not refer to the central role of the states in matters of criminal justice in order to avoid its international legal obligations. The United States recognizes the fundamental principle that domestic law does not relieve a member of the international community of its obligations under international law. The United States also recognizes that there was a breach of an important international legal obligation when Arizona state officials failed to give consular notification as required

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[127] Memorial, Annex MG 14, p. 511.

[128] Memorial, Annex MG 20, p. 541.

by the Vienna Convention on Consular Relations. We explain our federal system so that the Court will understand that Federal Government officials do not have legal power to stop peremptorily the enforcement of a criminal sentence by the state of Arizona.

125. Some writers contend that United States domestic law might have offered further exceptional avenues for Federal authorities to block Arizona from acting in the hours following the Court's order. Various untried mechanisms for such urgent action have been suggested, including the suggestion of an order by the President of the United States directing a state governor to prevent the execution.[129] In a government that operates under the rule of law, the chief executive is not asked to sign orders of any kind without careful preparation and research to ensure that the order is legally authorized and sound. An Executive order to a state governor to stay an execution would have been unprecedented and fraught with legal uncertainty. Responsible Federal officials did not judge

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[129] *See* K. Highet, "The Emperor's New Clothes; Death Row Appeals to the World Court? The *Breard* Case As a Miscarriage of (International) Justice," in *Essays* in Memoriam *Judge José Maria Ruda*, Memorial, Annex MG 39, p. 763; C. Vázquez, "*Breard* and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures", 92 *Am. J. Int'l L.* (1998), p. 683.

that such steps against the State of Arizona were an available legal course under the circumstances of this case, particularly in the brief time allowed by the Court's Order.

126. Accordingly, in drawing the Court's Order to the attention of the Governor of Arizona, U.S. officials took the only relevant measure at their disposal, given the few hours available. It is wholly unreasonable to suppose that any more definitive actions could have been taken under the circumstances, even if they had been theoretically feasible under the United States legal structure.[130]

127. The third element of the Court's Order indicated that the United States "should inform the Court of all the measures which it has taken in implementation of this Order." This was done via a letter from the Legal Counselor of the United States Embassy in The Hague to the Court dated 8 March 1999. The letter described the communications between the Federal Government and the state of Arizona, as well as the proceedings in the United States Supreme Court referred to above.

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[130] Germany's Memorial goes so far as to suggest that the United States took "a number of active steps ... which paved the way for the execution of Walter LaGrand." (Memorial, para. 4.171) To the contrary, any ability the United States might have had to take actions -- affirmative or negative -- *vis-à-vis* the LaGrand case, beyond simply reacting to the multiple proceedings initiated by Germany, was effectively precluded by the last-minute timing chosen by Germany for its filings, both with this Court and the United States Supreme Court. When the Supreme Court requested the views of the Solicitor General, for example, he was duty-bound to reply as accurately as possible in the time allowed.

CHAPTER III

THE COURT'S ORDER BY ITS TERMS DID NOT CREATE BINDING LEGAL OBLIGATIONS

128. The previous section shows how the United States responded as fully as possible to the Court's Order, given the circumstances and the extraordinarily short time for response available in the circumstances. This section considers the legal ramifications of this particular Order in light of the terms used by the Court in framing it.

129. The terms of the Court's 3 March Order did not create legal obligations binding on the United States. When considering how to determine whether a resolution of the Security Council is or is not mandatory, the Court made the following observation:

> The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25 [of the United Nations Charter], the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, ...[131]

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[131] *Legal Consequences for Status of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971*, p. 53, para. 114.

The same principles can be applied in assessing the character of the Court's Order here.

130. The language used by the Court in the key portions of its Order is not the language used to create binding legal obligations. Instead, the key passages state that the United States "should" take specified actions.[132] This is the distinctive phrasing regularly used in international legal affairs when parties choose to signal an expectation -- even a high expectation -- that something will be done, but not an intention to create mandatory legal obligations.

131. Both this Court and the Permanent Court of International Justice have consistently used the term "should" when indicating provisional measures.[133] By

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[132] Since English is the authoritative text of the 3 March Order, there is no need for consideration of other languages in this context.

[133] As to the Court's practice, see, *e.g.*, *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 248; *Application of the Convention on the Prevention of the Crime of Genocide, Orders of 13 September 1993 and 16 April 1993, I.C.J. Reports 1993*, pp. 325 and 3 (respectively); *Frontier Dispute, Provisional Measures, Order of 10 Jaunary 1986, I.C.J. Reports 1986*, p. 3; *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984*, p. 169; *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 7,; *Nuclear Tests (Australia v. France and New Zealand V. France), Interim Protection, Orders of 22 June 1973, I.C.J. Reports 1973*, pp. 99 and 135 (respectively); *Fisheries Jurisdiction (United Kindom v. Iceland and Federal Republic of Germany v. Iceland), Interim Protection, Orders of 17 August 1972, I.C.J. Reports 1972*, pp. 12 and

contrast, this Court uses very different language when issuing final judgments intended to express or create legally binding obligations. Thus, for example, the Court in the *Fisheries (U.K. v. Iceland)* case stated that "the Government of Iceland and the Government of the United Kingdom are under mutual *obligations* to undertake negotiations ... ."[134] In the *Nicaragua* case, the Court found the United States to be in "violation" or "breach" of numerous obligations under international law.[135] Perhaps most emphatically, in its Judgment in the *Diplomatic Staff* case, the Court decided, *inter alia*, that Iran "*must* immediately take all steps to redress the situation resulting from the events of 4 November 1979 … ."[136]

132. The Court has also explicitly declined to recognize as binding French terminology translated as

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30 (respectively); *Anglo-Iranian Oil Co., Interim Protection, Order of 5 July 1951, I.C.J. Reports 1951*, p. 89.

[134] *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 34, para. 79(3) (emphasis added).

[135] *See Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 123, 128, 140, 146, paras. 238, 252, 280, 292.

[136] *United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Judgment, I.C.J. Reports 1980*, p. 44, para. 95(3) (emphasis added).

"should." In the *Aegean Sea* case,[137] the Court rejected an argument by Greece that, based on the use of the word "décidé" and the words "doivent être résolus" in the original text (which the Court understood in English to refer to a "decision" regarding matters that "should be resolved"[138]) a joint communiqué issued by Greece and Turkey constituted a "definitive agreement" to submit the dispute to the Court.

133. In light of the many years of such consistent practice by the Court, the international community has come to recognize that explicit wording must be used by international tribunals where their intention is to create binding obligations. For example, the International Tribunal of the Law of the Sea, which, as discussed more fully below,[139] is empowered to "prescribe" rather than "indicate" provisional measures, uses the word "shall" in its orders prescribing such measures.[140]

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[137] *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, pp. 38-44, paras. 94-108.

[138] *Ibid.* at p.43, para. 105

[139] *See* para. 144 below.

[140] *See M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Provisional Measures, Order of 11 March 1998*, 37 *I.L.M* (1998) p. 1202; *Southern Bluefin Tuna Cases (New Zealand v. Japan and Australia v. Japan), Provisional Measures, Order of 27 August 1999*, 38 *I.L.M.* (1999) p. 1624 (English texts authoritative).

134. The type of language used by international tribunals when they clearly intend to create binding obligations is further illustrated by the orders of the International Criminal Tribunals for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR"). For example, in its warrant for arrest and order of surrender of Slobodan Milošević (24 May 1999), the ICTY "directed" UN Member States to "arrest, detain, and surrender" Milošević to the tribunal.[141]

135. The use of "should" in non-binding contexts and of quite different terminology (such as "shall" or "must") where a binding legal obligation is intended is also common practice in the drafting of treaties and other international instruments. Thus, a statement adopted at the 1993 United Nations Conference on Environment and Development entitled "Non-legally binding authoritative statement of principles for a global consensus on the management of conservation and sustainable development of all types of forests" uses "should" (along with other qualified language) consistently throughout the text.[142]

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[141] *The Prosecutor v. Slobodan Milošević*, Warrant of Arrest and Order for Surrender, Case No. IT-99-37-1, Decision of 24 May 1999, The International Criminal Tribunal for the Former Yugolslavia, U.S. Exhibit 12.

[142] Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management of Conservation and Sustainable

Academic commentators also recognize the role played by the term "should" to indicate non-binding undertakings. For example, a recent article on the draft Multilateral Agreement on Investment ("MAI") proposed revisions of the text reflecting this very terminology:

> To bring the national treatment language in line with the MAI's non-binding treatment of investor obligations and environmental safeguards, "shall" should be replaced with "should" or with "shall endeavor to" in the MAI's section on national treatment.[143]

136. United States domestic courts regularly construe the term "should" in this same sense. A Florida state court has opined that

> [t]he section [of the Florida Administrative Code] dealing with resignations states that an employee "should" present reasons for his resignation in writing to the agency. Use of the word "should" indicates to us that the procedure for resignations is discretionary rather than mandatory in nature.[144]

In a different context and another corner of the country, an Idaho court held that

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Development of All Types of Forests, June 13, 1992, U.N. Doc A/CONF.151/6/Rev.1, 31 *I.L.M.* 881.

[143] M. Vallianatos, "De-Fanging the MAI," 31 *Cornell Int'l L.J. (1998)* p. 713, at p. 718 (footnotes omitted).

[144] *University of South Florida v. Tucker*, 374 So.2d 16 (1979).

> the MUTCD [Manual of Uniform Traffic Control Devices] provides that the term "should" is "an advisory condition" and that, where it is used, the action it refers to is "recommended but not mandatory." Therefore, the traffic indications described ... are merely recommendations, not mandatory in nature.[145]

137. The word "should" is thus a term used both by the Court and in many other settings to indicate a call or an exhortation for action, but not a binding legal obligation. As such, any perceived deviation by the United States from the terms of the Court's 3 March Order would not in any sense constitute a violation of obligations under international law.

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[145] *Lawton v. City of Pocatello*, 886 P.2d 330; 126 Idaho 454 (1994).

CHAPTER IV

PROVISIONAL MEASURES OF THE COURT DO NOT CREATE BINDING LEGAL OBLIGATIONS BY OPERATION OF ARTICLE 41 OF THE STATUTE OF THE COURT OR OF ARTICLE 94 (1) OF THE UNITED NATIONS CHARTER, OR BY OPERATION OF GENERAL PRINCIPLES OF INTERNATIONAL LAW

Section I. Introduction

138. As the previous discussions show, the United States did all that could plausibly be expected of it in the roughly two hours available to respond to the Court's Order, and to the other actions brought concurrently in United States courts by Germany. Further, the language employed in the Order of 3 March makes clear that this particular Order did not in any case impose binding legal obligations. Thus, the Court does not need here to decide the difficult and controversial legal question of whether its orders indicating provisional measures would be capable of creating international legal obligations if worded in mandatory, not precatory, terms. This Chapter is therefore included solely to assist the Court should it nevertheless determine that it must decide this issue.

139. It must be acknowledged, as Professor Rosenne observes, that

> [t]he question of whether ... an indication of provisional measures is binding on the parties to the provisional measures proceedings is controversial.[146]

However, as one contemporary commentator has concluded:

> There can be little doubt ... that the preponderant view is that an indication of interim measures [by the International Court of Justice] is not binding.[147]

The United States shares this view.

140. The following discussion examines how the language and history of Article 41(1) of the Court's Statute and Article 94 of the Charter of the United Nations, the Court's and State practice under these provisions, and the weight of publicists' commentary, all show that indications of provisional measures do not have mandatory effect under international law. This section also addresses Germany's more theoretical arguments in favor of such mandatory effect and underscores that, whatever the general rule may be, the rushed *ex parte* proceedings leading to the Order in this case counsel that

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[146] S. Rosenne, *The Law and Practice of the International Court, 1920-1996* (3rd Ed. 1997), Vol. III, p. 1434. The history of the controversy has been thoroughly and thoughtfully analyzed and documented by Professor Jerzy Sztucki in his 1983 book *Interim Measures in the Hague Court*, pp. 260-302.

[147] L. Collins, "Provisional and Protective Measures in International Litigation," in *Recueil des Cours/Collected Courses of the Hague Academy of International Law 1992*, III, vol. 234 (1993) p. 219.

it should not be deemed to give rise to obligations that implicate State responsibility.

Section II. The Constitutive Instruments of the Court Do Not Confer Authority to Issue Binding Provisional Measures

141. The Court's authority to indicate provisional measures derives from Article 41 of its Statute, the text of which makes clear that indications of provisional measures do not give rise to binding legal obligations. The text of Article 41 is the foundation of the Court's authority in this area, and must be carefully examined:

> 1. The Court shall have the power to *indicate*, if it considers that circumstances so require, any provisional measures which *ought to be taken* to preserve the respective rights of either party.
>
> 2. Pending the final decision, notice of the measures *suggested* shall forthwith be given to the parties and to the Security Council. (Emphasis added.)

This text is in substance identical to Article 41 of the Statute of the Permanent Court of International Justice, substituting reference to the United Nations Security Council for reference to the Council of the League of Nations.

142. The language of Article 41 is not the language that lawyers employ to create legal obligations. Three

aspects stand out. First, provisional measures are to be "indicated" by the Court, not "prescribed". The verb "indicate" has been defined as follows:

> To point out or point to or toward with more or less exactness: show or make known with a fair degree of certainty.[149]

Thus, the key verb does not convey the notion of prescription or obligation. Rather, "to indicate" involves the idea of pointing out or identifying a course of action, and of doing so in a way that is not necessarily certain or precise in every respect.

143. The international community has recognized that "indicate" does not mean "prescribe," and has taken care to make clear when the goal is to grant compulsory power. Thus, in the 1928 General Act for the Pacific Settlement of International Disputes, Article 33(1) states:

> In all cases where a dispute forms the object of arbitration or judicial proceedings ... the Permanent Court of International Justice, acting in accordance with Article 41 of its Statute ... shall lay down within the shortest possible time the provisional measures to be adopted. *The*

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[149] *Webster's Third New International Dictionary* (1981), p. 1150. The *Oxford English Dictionary* defines "indicate" similarly to mean: "To point out, point to, make known, show (more or less distinctly)." *Oxford English Dictionary* (1989), Vol. VII, p. 860.

> ***parties to the dispute shall be bound to accept such measures.***[149]

It is very unlikely that the sentence highlighted above would have been added if the drafters of the General Act had believed that provisional measures issued under Article 41 of the Permanent Court's Statute were *per se* binding.

144. In the same vein, Article 290 of the Law of the Sea Convention empowers the International Tribunal for the Law of the Sea ("ITLOS") to "prescribe" rather than to "indicate" provisional measures.[150] The significance of this difference in terminology was explained in 1991 by the Registrar of this Court in a statement made at a meeting of the ITLOS Preparatory Commission:

> On the issue of provisional measures, ... [t]he use of the term 'prescribe' rather than 'indicate', which was the expression employed in the Court's Statute, seemed to suggest that the [Law of the Sea] Convention's measures would be binding ... . In the case of the International

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[149] Pacific Settlement of Disputes (General Act), done at Geneva, September 26, 1928, 93 LNTS 343 (1928), p. 357 (emphasis added).

[150] United Nations Convention on the Law of the Se[illegible] opened for signature December 10, 1982, U.N. Doc. A/CONF.62/122 ([illegible]2), 21 *I.L.M.* 1261 (1982). *See* J. Noyes, "The International Tribunal for the Law of the Sea," 32 *Cornell Int'l L.J.* (1998), p. 109, in which the author states, "It is beyond cavil that [ITLOS] provisional measures are binding." *Ibid.* at 135.

Court, it could only 'indicate' what measures were to be provided.[151]

145. When the language of Article 41 was originally considered in 1920 by the Advisory Committee of Jurists, a conscious decision was made to substitute the word "indiquer" for "ordonner", the word used in the initial proposal.[152] A corresponding change was made in the English from "order" to "suggest".[153] (When the text was later considered by the League of Nations Assembly, "indicate" was substituted for "suggest" in the English text in order to better conform it to the French; however, an explicit effort to restore the term "ordonner" was rejected on the basis that the "Court lacked the means of execution."[154])

146. Germany's Memorial cites Hudson's attempt to explain the use of the term "indiquer" as simply "being

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[151] United Nations Press Release, SEA/1284, 29 August 1991, reproduced in R. Platzöder, *The Law of the Sea: Documents 1983-1991* (1992), Vol. XIII, p. 510.

[152] Sztucki, *supra* note 146, at p. 264. For the text of the original proposal, *see Permanent Court of International Justice, Advisory Committee of Jurists, Procès Verbaux of the Proceedings of the Committee* (1920) (hereinafter "ACJ I"), p. 609.

[153] ACJ I, *supra* note 152, at p. 666.

[154] *League of Nations. Permanent Court of International Justice. Documents concerning the Action taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court* (1920) (hereinafter "ACJ II"), p. 134.

designed to avoid offense to the susceptibilities of states."[155] However, other prominent observers at the time took precisely the opposite view. For example, Åke Hammarskjöld, Registrar and later judge on the Permanent Court, wrote a seminal article in 1935 making and elaborating the point that to "indicate" is not to "order".[156]

147. The second key aspect of the wording of Article 41 is that the indicated measures are those which "*ought* to be taken". This is also not the language of legal obligation but of encouragement or exhortation. The same dictionary defines "ought" as "used to express moral obligation, duty".[157] This is not directive, mandatory language.

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[155] Memorial, para. 4.139, citing M. Hudson, *The Permanent Court of International Justice, 1920-1942* (1943), p. 425.

[156] Å. Hammarskjöld, "Quelques aspects de la question des mésures conservatoires en droit international positif" (1935), reproduced in Å. Hammarskjöld, *La juridiction internationale* (1938), p. 299. *See also* Sztucki, *supra* note 146, at p. 281, and J. Elkind, *Interim Protection: A Functional Approach* (1981), p. 155.

[157] *Webster's Third New International Dictionary* (1981), p. 1599. The relevant definition for "ought" in the *Oxford English Dictionary* states:

> The general verb to express duty or obligation of any kind; strictly used of moral obligation, but also with various weaker shades of meaning, expressing what is befitting, proper, correct, advisable, or naturally expected.

Oxford English Dictionary (1989), Vol. X, p. 991.

148. Once again, the drafting history supports this understanding: The original proposal considered by the Advisory Committee of Jurists used the term "must"; in later versions, it was changed to "should".[158] Ultimately, the Assembly of the League of Nations substituted the phrase "ought to".[159] While the League Assembly clearly intended to strengthen the degree of moral force behind the measures contemplated by this provision, the language used is still the language of exhortation, not of obligation. The League Assembly stopped far short of reinstating the term "must".

149. Third, Article 41(2) describes the measures as being "suggested". They are not "ordered", "required", or any of many other forms of words that normally indicate legal obligation. Provisional measures are "suggestions", albeit of a special character and entitled to special weight and consideration. Again, the drafting history bears out this interpretation. The initial English version used the phrase "notice of these measures," and this was changed by the Advisory Committee of Jurists to read

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[158] ACJ I, *supra* note 152, at pp. 666, 681, and 736, respectively.

[159] ACJ II, *supra* note 154, at p. 134. *See also* Sztucki, *supra* note 146, at p. 264.

"measures suggested".[160] Despite its close scrutiny of and other changes to this provision, the League Assembly opted to leave this phrase intact.

150. The legal effect of Article 41 was again addressed at length in connection with certain amendments proposed in 1931. At that time, the Court considered a proposed revision by Judge Fromageot that would have directed the Court to take note of, and report to the League's Security Council, a failure by a party to abide by a provisional "order" of the Court.[161] According to a record of the meetings to discuss the 1931 revisions, "M. Fromageot said he had used the word 'order' advisedly; the word 'indicate' employed in the Statute and Rules appeared to him somewhat vague."[162]

151. Other judges objected to the use of the word "order", and a substantial discussion of the character or weight of the Court's indications of provisional measures ensued. While views were expressed on both sides of the issue, in the end, Judge Fromageot's proposal was rejected

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[160] ACJ I, *supra* note 152, at pp. 609, 681, 736.

[161] *Permanent Court of International Justice. Acts and Documents Concerning the Organization of the Court,* Ser. D, No. 2, Add. 2 (1931), p. 289.

[162] *Ibid.* at p. 182.

by eight votes to two.[163] This discussion highlights that, under the predecessor to the Court's present Statute, indications of provisional measures did not implicate State responsibility. We know of nothing in the history of the Court's present Statute suggesting a different conclusion regarding its effect.

152. The German Memorial attaches significance to the other official languages of Article 41 of the Court's Statute and argues that at least three of those languages, the French, the Spanish, and the Chinese convey a greater degree of obligation.[164] However, these arguments are far from conclusive. For example, as Germany recognizes, the key word used in the Russian translation ("указать" or "ukazat") at least arguably conveys a degree of ambiguity on this point similar to the English term "indicate".[165] In any case, the authoritative text of the Court's 3 March 1999 Order was in English.[166] It should therefore be

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[163] *Ibid.* at pp. 181-99. *See also* Sztucki, *supra* note 146, at pp. 267-8.

[164] Memorial, paras. 4.149, 4.150.

[165] Memorial, para. 4.150. The United States would defer to those on the Court whose mother tongues are implicated by such arguments. However, a consultation of Russian dictionaries by Department of State language experts indicates that the phrase "direct, order or prescribe" was not included as one of the meanings of the verb "ukazat" in one of the most authoritative such dictionaries (С.И. Ожегов, Словарь русского языка (1990)).

[166] Order of 3 March 1999, at p. 16.

construed in accordance with the English text of Article 41, and in a way that does not disregard its clear language.

153. Both the language and the history of Article 41 thus confirm that it is not a source of binding legal obligations. In this connection, the United States takes note of Germany's suggestion in its Memorial that, pursuant to Article 32 of the Vienna Convention on the Law of Treaties, the *travaux préparatoires* need not -- indeed should not -- be considered by the Court, presumably because of Germany's belief that its interpretation of Article 41 of the Court's statute leaves no room for reasonable debate.[167] As is clear from the arguments in this case, however, Article 41 is at the very least susceptible to different readings. Moreover, as one commentator on the Vienna Convention on the Law of Treaties has said:

> [N]o rigid temporal prohibition on resort to the *travaux préparatoires* of a treaty was intended by the use of the phrase 'supplementary means of interpretation' in what is now Article 32 of the Vienna Convention. The distinction between the general rule of interpretation and the supplementary means of interpretation is intended rather to

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[167] Memorial, at paras. 4.151-152.

> ensure that the supplementary means do not constitute an alternative, autonomous method of interpretation divorced from the general rule.[188]

154. Article 94 of the Charter also shows the non-binding character of indications of provisional measures. Article 94 establishes the basic obligation of States to comply with judgments of the Court. This fundamental Charter obligation of compliance relates to the definitive expressions of the Court – its judgments. It does not extend to other types of actions by the Court. Article 94 provides:

> 1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
>
> 2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

155. Although paragraphs 1 and 2 use different language – paragraph 1 speaks of "the decision" of the

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[188] I.M. Sinclair, *The Vienna Convention on the Law of Treaties* (1984), p. 116. It also bears noting that, elsewhere in its Memorial – and presumably where the history seems more in line with Germany's argument, Germany does not hesitate to discuss the relevant *travaux préparatoires* at some length. *See, e.g.*, Memorial, para. 4.97 *et seq.*

Court, while paragraph 2 speaks of "a judgment" - their scope is the same. As Judge Mosler explains,

> [t]he term 'decision' (*'décision'*) ... is tantamount to the term 'judgment' (*'arrêt'*). This interpretation follows from the usage of both terms in Arts. 57-60 of the Statute and in Art. 94 of the Charter. These provisions refer, in their context, to the judgment or judgments on the merits, including judgment on the form and amount of reparation.[169]

The reference to the Court's "decision" in paragraph 1 is singular. It is the Court's final act - its ultimate decision - to which Article 94(1) applies. Moreover, "decision" is modified by the definite article "the." This shows that the paragraph relates to the single final or definitive action of the Court - its judgment.[170] In the words of a former deputy registrar of the Court:

> La juxtaposition des termes, l'emploi de l'article défini et du singulier, tout concourt à montrer que "la décision"

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[169] Mosler, "Article 94" in *The Charter of the United Nations. A Commentary* (1994), pp. 1003-4 (B. Simma, ed.). (Judge Mosler agrees with Germany's position here: that indications of provisional measures are legally binding. However, this stems from his analysis of Article 41, and does not rest on Article 94. *Id.*)

[170] H. Kelsen, *The Law of the United Nations* (1951), p. 720. As Germany points out in its memorial (para. 4.132), other commentators have taken a different view of Article 94(1). However, the United States does not share the view offered by Germany that "logic as well as an analysis of the object and purpose of Article 94 must lead to" Germany's conclusions regarding Article 94. Professor Sztucki offers a thoughtful and well-reasoned discussion of this issue in his book on provisional measures and the Court. Sztucki, *supra* note 146, at 285-6, 289.

> dont il s'agit est celle qui règle définitivement un litige, donc l'arrêt final ou l'ensemble des arrêts finals.[171]

156. In light of such factors, as Judge Singh concluded (reluctantly, but we believe correctly), Article 94 does not give rise to a duty of compliance corresponding to that due the final judgments of the Court:

> The limitations of [Article 94(2) of the Charter] ... as a means of securing compliance with a judgment (and the fact of its virtual non-use for that purpose) are well known: it is doubtful that the 'obligations incumbent ... under a judgment' extend, for example, to respect for an order indicating provisional measures. [footnote omitted][172]

157. Germany's Memorial asserts that during the December 1979 oral proceedings on the United States request for provisional measures against Iran in the *Diplomatic Staff* case, Mr. Owen, the Agent for the United States, suggested that the obligation under Article 94(1) of the Charter might extend to the Court's orders indicating provisional measures. Germany refers to the following statement by Mr. Owen:

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[171] A. Pillepich, "Article 94," in *La Charte des Nations Unies* (1991), p. 1281 (J. Cot and A. Pellet, eds.).

[172] Judge N. Singh, *The Role and Record of the International Court of Justice* (1989), p. 42.

> Iran has formally undertaken pursuant to Article 94 paragraph 1 of the Charter ... to comply with the decision of this Court in any case to which Iran might be a party. Accordingly, it was the hope and expectation of [the United States Government] that the Government of Iran, in compliance with its formal commitments and obligations, would obey any and all Orders and Judgments which might be entered by this Court in the course of the present litigation.[173]

However, when considered in its totality, this statement does not necessarily convey the legal interpretation Germany finds in it. The first sentence is essentially a paraphrase of Article 94(1). It must be read in connection with the second sentence, which expresses the expectations of the United States in light of the broad fabric of Iran's international obligations at the time. The "formal commitments and obligations" referred to embrace the whole range of treaty and other obligations breached by Iran when it allowed the takeover of the United States Embassy compound. The argument is broad and political in character, as shown by the use of the somewhat tentative terms "hope and expectation," rather than a more categorical expression of direct legal obligation to comply with the provisional measures ordered by the Court.

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[173] Memorial, para. 4.132, citing *United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Pleadings, I.C.J. Reports 1980*, p. 266 (Statement of Roberts Owen).

158. Accordingly, the principal texts governing the regime of provisional measures - Article 41 of the Statute and Article 94 of the Charter - both show that such measures do not impose legal obligations that bring into operation the regime of State responsibility.

Section III. The Court's Practice Confirms the Non-Binding Character of Indications of Provisional Measures

159. The Court's judgments have reflected the same understanding of these governing texts. The Court simply has not treated indications of provisional measures as giving rise to international legal obligations for States.

160. The Court considered the implications of an order indicating provisional measures most clearly with reference to those indicated in the *Nicaragua* case. The Court there described the consequences stemming from such an order in language indicating that such measures have a particular weight and authority, but at the same time making clear that they are not sources of binding legal obligations:

> When the Court finds that the situation requires that measures of this kind should be taken, it is incumbent on each party to take the Court's indications seriously into

> account, and not to direct its conduct solely by reference to what it believes to be its rights.[174]

As Judge Shahabuddeen explained in connection with the *Bosnia Genocide* case:

> That [Court's] statement [in the *Nicaragua* case] ... stopped short, in its careful formulation, of saying that provisional measures are binding. Indeed, it could bear the interpretation that the measures themselves are not binding, a party merely having a duty to take account of the Court's indication of them.[175]

161. The practice of States also shows that the Court's indications of provisional measures have not been understood to impose binding legal obligations. Indeed, for the most part, Parties have not carried the actions recommended by the Court into full effect, leading one commentator to observe, albeit reluctantly, that:

> It is at least open to argument that States themselves have built up a body of practice, treating interim measures as

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[174] *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 144, para. 289.

[175] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 365. *See also*, H.W.A. Thirlway, "The Indication of Provisional Measures by the International Court of Justice," in *Interim Measures Indicated by International Courts* (1994), pp. 32-3 (R. Bernhardt, ed.).

> nonbinding. In other words, it could be argued that there has been a *de facto* clarification of Article 41.[176]

162. The Court's judgments have rarely found such lack of compliance worthy even of mention. Thus, in the *Anglo-Iranian Oil Company* case, the Court stated that its order on provisional measures had ceased "to be operative," but did not comment on Iran's failure to comply with the provisional measures it had indicated.[177] In the *Fisheries Jurisdiction* cases, the judgments noted the fact that Iceland did not act consistently with the Court's indication of provisional measures, but did not ascribe legal weight to this.[178]

163. In *Nuclear Tests*, the Court noted the Government of Australia's argument that the French had committed a "deliberate breach of the Order" indicating provisional measures.[179] However, the Court did not express any view on the point or identify any consequences in its judgment. In

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[176] Elkind, *supra* note 156, at p. 164.

[177] *Anglo-Iranian Oil Company (United Kingdom v. Iran), Preliminary Objection, I.C.J. Reports 1952*, p. 114.

[178] *Fisheries Jurisdiction (United Kingdom v. Iceland; Germany v. Iceland) I.C.J. Reports 1974*, pp. 16-17, para. 33, and p. 188, para. 32 (respectively). ("Iceland ... notwithstanding the measures indicated by the Court, began to enforce the new Regulations ...").

[179] *Nuclear Tests (Australia v. France), I.C.J. Reports 1974*, p. 259, para. 19.

the *Diplomatic Staff* case, the Court confined its comments regarding Iran's failure to comply with provisional measures to the following: "it is a matter of deep regret that the situation ... has not been rectified ... ."[180] Regret, perhaps, but not the breach of a legal obligation.

164. An extensive and consistent body of practice thus indicates that neither States nor the Court have understood indications of provisional measures to impose legal requirements.

Section IV. Germany's Functional Argument For A Binding Obligation To Comply With Provisional Measures Also Lacks Merit

165. Germany advances a further, more theoretical argument that provisional measures must have binding effect based not on legal texts or other positive indications of international law but on what it terms "the principle of institutional effectiveness."[181] In essence, Germany contends that for the Court to be able to issue final judgments that are binding under international law, it must have inherent authority to issue interim orders with the same effect. However, as Professor Sztucki demonstrates,

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[180] *United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Judgment, I.C.J. Reports 1980*, p. 42, para. 92.

[181] Memorial, paras. 4.125-7. *See also* Memorial, paras. 4.141, 4.147-8.

whatever the symmetrical appeal and logic this argument may have, it is flawed, because "there is in international law no such peremptory correlation between the legal effects of final and interlocutory decisions."[182] In an arena where the concerns and sensitivities of States, and not abstract logic, have informed the drafting of the Court's constitutive documents, it is perfectly understandable that the Court might have the power to issue binding final judgments, but a more circumscribed authority with respect to provisional measures.

Section V. Whatever the General Rule May Be, This Order Should Not Be Construed to Have Binding Legal Character

166. Whatever the general rule may be, in the unique circumstances here, the Court should not construe its order as creating legal obligations that trigger the rules of State responsibility. Germany's Memorial acknowledges that the legal weight of any indication of provisional measures can be affected by the surrounding circumstances:

> *In principle, and subject to a careful analysis of each specific order,* the breach of an order of the Court brings

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[182] Sztucki, *supra* note 146, at p. 291. Professor Sztucki cites a number of examples to support this conclusion at p. 263, and elaborates further his argument at pp. 291-94.

> into operation the ordinary principles of state responsibility.[183] (Emphasis added.)

We do not agree with the asserted general proposition, even "in principle". However, there are compelling reasons for the 3 March Order not to be interpreted to be legally binding, given the extraordinary and rushed process leading to it.

167. As we have shown, Germany's decision to file this case when and as it did was unreasonable, unnecessary and placed the Court in an extremely difficult position. The Court could respond to Germany's action only through the exceptional step of an *ex parte* order, based solely on the legal claims and factual representations of one party. Then, the Party to whom the Order was directed was given only about two hours in which to respond.

168. Because of the press of time stemming from Germany's last-minute filing of the case, basic principles fundamental to the judicial process were not observed in connection with the Court's 3 March Order. Thus, whatever one might conclude regarding a general rule for provisional measures, it would be anomalous -- to say the least -- for

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[183] Memorial, para. 3.32.

the Court to construe this Order as a source of binding legal obligations.

Section VI. The United States Conduct Following Initiation of This Proceeding Also Has Not Violated Any Customary International Law Obligations

169. Toward the end of its discussion of the Court's 3 March Order, the Memorial adds a cursory point to the effect that:

> The United States has violated the obligation to refrain from any action which might interfere with the subject matter of a dispute while judicial proceedings are pending.[184]

Such a claim involves issues of general law, not the Vienna Convention. Hence, the Court does not have jurisdiction to consider it under the Optional Protocol. The implications of the rule as presented by Germany are potentially quite dramatic, however. Germany appears to contend that by merely filing a case with the Court, an Applicant can force a Respondent to refrain from continuing any action that the Applicant deems to affect the subject of the dispute. If the law were as Germany contends, the entirety of the Court's rules and practices relating to provisional measures would be surplussage. This is not the law, and this is not how States or this Court have acted in practice.

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[184] Memorial, para. 4.147.

PART VII

THE COURT CANNOT CREATE OR COMPEL A GUARANTEE REGARDING FUTURE CONDUCT

170. Germany's final submission calls for the Court to adjudge and declare:

> [T]hat the United States shall provide Germany a guarantee that it will not repeat its illegal acts and ensure that, in any future cases of detention of or criminal proceedings against German nationals, United States domestic law and practice will not constitute a bar to the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations.[185]

171. Germany thus seems to request that the Court somehow require the United States to confer upon Germany new or additional rights exceeding those already existing by reason of the Convention. Such a request goes beyond any remedy that the Court can or should grant, and shoulc be rejected. The Court's power to decide cases in its role as the principal judicial organ of the United Nations does not extend to the power to order a State to provide any "guarantee" intended to confer additional legal rights on the Applicant State.

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[185] Memorial, para. 7.02.

172. As Professor Rosenne observes:

> The International Court is not a legislative body established to formulate new rules of law. In a sense this is stating the obvious. Nevertheless, confusion persists. The Court, like all courts, applies the *existing* law. It does not "create" new rules of law either for the parties to a given dispute or for the international community at large.[186]

173. The United States does not seek license to commit future breaches of its obligations under the Vienna Convention. The United States keenly appreciates the importance of the Vienna Convention's consular notification obligation for foreign citizens in the United States as well as for U.S. citizens traveling and living abroad. As explained in Part II, U.S. authorities are working energetically to strengthen the regime of consular notification at the state and local level throughout the United States, in order to reduce the chances of cases such as this recurring. The United States would welcome the suggestions and assistance of the Government of Germany in those endeavors. Nevertheless, the relevant legal obligations are those contained in the Vienna Convention. The United States does not believe that it can be the role of the Court, in the performance of its judicial function, to impose any obligations that are additional to or that differ in character from those to which the United States consented when it ratified the Vienna Convention.

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[186] S. Rosenne, *The World Court. What It Is and How It Works* (1995, Fifth Revised Ed.), p. 38 (emphasis in original).

PART VIII

CONCLUSION AND SUBMISSIONS

174. The United States acknowledges that there was a breach of the Vienna Convention obligation of consular notification in the cases of Karl and Walter LaGrand. The United States has apologized to Germany for that breach, and is working to prevent any recurrence. The United States disputes the admissibility of Germany's further claims. In any case, for the reasons shown in this Counter-Memorial, Germany's claims other than those directly related to the acknowledged breach of the consular notification obligation should be rejected on their merits.

175. Accordingly, on the basis of the facts and arguments set forth in this Counter-Memorial, and without prejudice to the right further to amend and supplement these submissions in the future, the United States asks the Court to adjudge and declare that:

(1) There was a breach of the United States obligation to Germany under Article 36 (1)(b) of the Vienna Convention on Consular Relations, in that the competent authorities of the United States did not promptly give to Karl and Walter LaGrand the notification required by that Article, and that the United States has apologized to Germany for this

breach, and is taking substantial measures aimed at preventing any recurrence; and

(2) That all other claims and submissions of the Federal Republic of Germany are dismissed.

27 March 2000

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